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260 - 30113

239 I.A. 643

MARY C. SWANSON,
Appellee,

vs.

HENRY A. STAIB,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant seeks to have reversed a judgment against him for $590, the value of certain household furniture claimed by the plaintiff, which defendant refused to deliver to plaintiff on demand. There was a trial before the court without a jury, and defendant claims the finding and judgment are manifestly against the weight of the evidence.

The evidence on the part of the plaintiff tends to prove that defendant was married to the plaintiff's daughter in 1918 and went to live with his wife in an apartment which was furnished by her; that soon after, defendant entered the United States army, and was discharged in the latter part of 1919, when he returned and occupied the same furnished apartment until 1920; when his wife left him; that in 1922 he obtained a divorce; that after the separation, defendant's wife went to California, and in July, 1924, gave her mother, the plaintiff, a bill of sale for all the furniture she owned and which was then in the possession of the defendant. Soon after, a formal demand was made on defendant for the property, but the demand was refused and this suit followed. The brother and sister of defendant's wife both testified the property was worth $600.

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239 I.A. 643

MR. JUSTICE FULTON DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant seeks to have reversed a judgment against him for $800, the value of certain machinery claimed by the plaintiff, which defendant refused to deliver to plaintiff on demand. There was a trial before the court without a jury, and defendant claims the finding and judgment are manifestly against the weight of the evidence.

The evidence on the part of the plaintiff tends to prove that defendant was married to the plaintiff's daughter in 1939 and went to live with his wife in an apartment which was furnished by her; that soon after, defendant entered the United States army, and was discharged in the latter part of 1946, when he returned and occupied the same furnished apartment until 1950, when his wife left him; that in 1952 he obtained a divorce; that after the separation, defendant's wife went to California, and in July, 1954, gave her mother, the plaintiff, a bill of sale for all the furniture who owned and which was then in the possession of the defendant. Soon after, a formal demand was made on defendant for the property, but the demand was refused and this suit followed. The testimony of defendant's wife tends to establish the purchase was prior 1950.

In his amended affidavit of merits, defendant did not deny that he had possession of the property in controversy. He denied that it was the property of his former wife, and denied ever receiving or refusing any demand for the possession of the property. The affidavit did not set up any claim of ownership in himself. On the trial, however, he testified that after the divorce he paid his former wife $425 and that in consideration of that payment she executed a written release from all liability, which was offered in evidence. The release does not mention the property in question or state that $425 had been paid for any purpose. It is a general release purporting to be made in consideration of "one dollar and other good and valuable considerations," and specifically purports to release the defendant from any claim the wife may have against her husband for alimony or support, or dower, or widow's award, or any other claim "in and to any property he may now have or hereafter may acquire." Defendant also testified that the property in question was used and was not worth more than $425.

When this release was offered in evidence, it was objected to by the plaintiff but the objection was overruled. It should have been sustained, as the release was incompetent under the issues made by the statement of claim and defendant's affidavit of merits. If the release be disregarded, there remains only the evidence on behalf of the plaintiff, which fully supports the judgment. If the release could be considered, however, it does not in terms support the oral claim of defendant that his wife thereby released him "from all claims that she had in the furniture." It rather tends to prove that no part of the amount he claims he then paid was paid for her furniture, but was intended to release defendant from any claim she might have against him for alimony or support, or - to use its own words - "from any and all liability

arising out of our relationship."

After a careful examination of all the evidence in the transcript, we are unable to say that the finding and judgment of the trial court are manifestly against the weight of the evidence. The judgment will therefore be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

4612

275 - 30128

239 I.A. 643

PEOPLE ex rel. JOSEPH K. BELL,
Appellee,

vs.

WILLIAM E. DEVER, Mayor, etc., et al.,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in a mandamus proceeding directing defendants to issue a license to petitioner to "engage in the business of a retail beverage dealer" at 2100 North Halsted street, Chicago. No brief has been filed by the petitioner.

The evidence tends to prove that the petitioner owns the premises in question and that prior to August, 1923, a "soft drink parlor" was operated therein under a license to one Keller, who apparently was a partner of the petitioner; that one Gottlieb then took a lease of the premises and applied for and obtained a license and conducted the same business until November, 1923, when a barrel of whisky was found on the premises, and Gottlieb's license was revoked; that petitioner then applied for a license, which was refused for two reasons; first, because a prior amusement license issued to him for part of the same premises had been revoked, and, second, because on several occasions he had been seen "tending bar" for Gottlieb. Petitioner's evidence was evasive and contradictory.

The writ of mandamus is not a writ of absolute right and should not be issued in doubtful cases. (People v. Blair, 292 Ill. 139.) Nor can it be used to control or review the discretion of properly authorized city officials in the matter

315 T.A. 643

of issuing licenses unless there has been a clear abuse of that discretion. (Harrison v. The People, 222 Ill. 150.) While such officials may not arbitrarily refuse to issue such a license, neither will they be compelled to issue one when in their discretion, reasonably and fairly exercised, it has been refused by them. (Harrison v. The People, supra, 153.)

No such abuse of discretion was shown in this case, and therefore the judgment was erroneous and is reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

285 - 30138

HERBERT PRENTICE CRANE, Jr., for use of Frederick A. Bangs, Appellee,

vs.

ILLINOIS MERCHANTS TRUST COMPANY, Appellant.

239 I.A. 643

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The facts involved in this appeal are exactly the same as those involved in No. 30137. The record shows the two cases were tried together in the lower court and they differ in no respect whatever except that in one case the judgment was in favor of Niemeyer while in this case it was in favor of Frederick A. Bangs for $7954. The notes were dated upon the same day, were made payable at the same time, executions were issued on the same day and returned nulla bona at the same time, and the same notice was given as in the Niemeyer case, supra.

For the reasons stated in the opinion in the Niemeyer case, supra, the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

4693

303 - 30156

239 I.A. 643

THE TOLEDO GLOVE MFG. CO.,
a corporation,
Appellant,

vs.

PHILLIP GIBSON, trading as
Phillip Girson & Co.,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The bill of exceptions in this case states that at the conclusion of a trial before the court without a jury, the court found the issues "for the plaintiff on the plaintiff's statement of claim, and for the defendant on the defendant's set-off," and entered judgment accordingly. The judgment as entered, however, states that the court found the issues against the plaintiff on its statement of claim, and against the defendant on his set-off, and entered a judgment against plaintiff for costs. Plaintiff appeals from the judgment entered, and as no other judgment appears in the transcript we must assume, as claimed by plaintiff's counsel, that the recital contained in the bill of exceptions is a mistake.

The claim of the plaintiff is for goods sold and delivered to defendant and interest thereon. The defendant claims a set-off of nearly twice that amount for damages arising from plaintiff's failure to deliver other goods included in the same order.

It appears from the evidence that plaintiff is a manufacturer of gloves in Toledo, Ohio, and defendant is a dealer in gloves in Chicago. In September, 1922, defendant sent a letter to plaintiff stating: "We are in receipt of your samples, mailed under date of the 11th inst., and you may enter our order as

follows: #2122 - 300 dozen now, 500 dozen later if goods come up right; #182 - 200 dozen now, 300 dozen later if goods come up right. The above goods to be shipped f.o.b. Chicago, as per terms on previous purchases." On October 19, 1922, plaintiff wrote to defendant: "We regret to state that we cannot make shipment of the 300 doz. of #2122 and 200 doz. of #182 on terms other than net 30, f.o.b. Toledo, prices subject to change without notice." To this letter defendant replied the next day directing plaintiff to ship the quantity specified at once "on terms outlined" by plaintiff. From other documents in evidence, it appears that the price agreed upon for the first shipment was $1.60 a dozen for the gloves included in lot #2122 and $1.05 for those included in lot #182. Plaintiff shipped part of each lot on November 11, 1922, and another part on November 24, 1922. The agreed price of the gloves so shipped was $473.30, which is the amount of the plaintiff's claim. By the terms of the contract the payments for these goods were due on December 17th and 24th, respectively, but such payments were not made. On January 6, 1923, defendant wrote to plaintiff that he had just received from the plaintiff a statement of the balance due, but that he was "going to protect" himself "by holding this amount back" until he received the rest of the goods ordered. To this plaintiff replied, January 10, 1923, that unless defendant paid the amounts past due before January 15th, all outstanding orders would be cancelled and the account placed with its attorneys for collection. Several letters followed, in which plaintiff insisted on being paid the amounts already due, and defendant refused to pay unless and until the remainder of the goods were shipped. On February 21, 1923, plaintiff wrote to defendant definitely refusing to proceed further under the contract because no payments had been made for the goods delivered.

Upon the trial, defendant's counsel admitted that defendant owed the amount claimed by the plaintiff, but claimed the right to

recoup or set off damages for the failure of plaintiff to ship the remainder of the goods. In this situation, the parties were very much in the position of the parties in Purcell v. Sage, 200 Ill. 342, where it was held that a buyer "was not entitled to recoup damages for a breach of the contract unless it had performed its part of the contract, or was ready and willing to do so at the time required," and that by refusing to make payment when such payment was due and was demanded, the buyer had failed to perform its part of the contract. In that case, it was also held, following Hess Co. v. Dawson, 149 Ill. 128, that "where the purchaser of articles fails to pay for the same as he agreed to, the vendor may abandon the special contract, and sue and recover in an action of assumpsit for the value of the articles sold and delivered to the defendant." That case was followed by Chicago Washed Coal Co. v. Whitsett, 278 Ill. 625, another case where the facts were similar to those of the present case. In the Appellate court case relied on by defendant's counsel, nothing was due for the goods received by the buyer until after the seller had shown, by its letters and conduct, that it did not intend to carry out its contract. No such facts appear in this case; and if they did, there is no competent evidence of defendant's alleged damages.

We agree with plaintiff's counsel that the judgment as entered of record is inconsistent with any theory of the facts in evidence. We cannot assume that the exhibits omitted from the bill of exceptions would help defendant, if they were here. They are letters, the general nature of which may be gathered from the letters which are in the record.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

334 - 30187

DORA McDONALD,
Appellee,

vs.

FRANK J. SIGLER,
Appellant.

239 I.A. 644

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

After a jury trial in a forcible detainer proceeding, the court directed a verdict for the plaintiff and entered a judgment against defendant for possession of the premises in controversy. Defendant appeals. There is no appearance on behalf of the plaintiff.

The evidence is uncontradicted. Plaintiff is the owner of an apartment building and leased one of the apartments to defendant, who was a corporal in the Marine Corps, for a term beginning September 1, 1924, and ending April 30, 1925. Defendant paid the first month's rent and took possession. On September 10th, he agreed in writing to cancel his lease and to "cease occupancy after September 15th," upon obtaining from plaintiff "such refund on moneys paid as suitable." Plaintiff did not "refund" anything, so defendant did not move. On September 17, 1924, plaintiff spoke to defendant's commanding officer at the training station and the latter dictated a new agreement and told defendant to sign it, which command defendant obeyed. The officer also asked for the keys and defendant handed them to the officer, who turned them over to the plaintiff.

The agreement defendant thus signed provides that defendant agrees to give up his lease if he is "reimbursed in the amount of 45 dollars" and to move "by noon, Friday, Sept. 19th, 1924," and if he does not move, then plaintiff "has the

privilege of removing the contents of the apartment." Plaintiff sent a check for $45 to the officer and on the same day (September 17, 1924) brought this suit. The check was never delivered to defendant and it was produced on the trial by plaintiff, unpaid and marked "cancelled." Defendant testified that he never saw it; that "one of the fellows" told him the officer had a check for him, and that the officer asked him if he wanted it, to which defendant replied "No".

From this evidence, it is clear that at the time this suit was begun, defendant, and not plaintiff, was lawfully entitled to the possession of the premises. Plaintiff did not perform either of the agreements upon which her alleged right to possession depends. Sending a check to defendant's commanding officer was neither performance, nor a tender of performance, of the second agreement; and if it were, the time stipulated therein for him to move had not arrived when this suit was brought. An owner cannot recover possession of leased premises from his lessee until the lease is terminated, and there is no evidence tending to prove that defendant's lease was terminated when this suit was brought.

The judgment is therefore reversed, and as no recovery can be had on the present complaint, the cause will not be remanded.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

346 - 30199

239 I.A. 644

IRA T. McCREADY,
Appellee,

vs.

ALEXANDER HENDRY COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against defendant for $644.55 in the Municipal court for damages alleged to have accrued to the plaintiff on account of poor workmanship and materials furnished in painting and decorating the basement and third floor apartment of a building in Chicago belonging to the plaintiff. The defense was accord and satisfaction. No questions of law are involved in the case.

The evidence tends to prove that plaintiff complained several times to defendant, during the progress of the work, about the manner in which it was being done, mainly regarding the failure of defendant's workmen to clean spots of glue and starch from the woodwork. Plaintiff requested changes to be made several times and they were made. When the work was done, defendant sent a bill to plaintiff for $1025, the contract price, and for $330.35 for extra labor and materials furnished in making the changes requested by plaintiff, which plaintiff refused to pay. About a month after the work was finished, defendant's secretary called plaintiff on the telephone and asked for a check. Plaintiff said he would not send a check, because he would not pay for the extra work. Defendant's president, Mr. Hendry, was seated in the office at the time and at the secretary's suggestion, took the telephone and conducted the

remainder of the telephone conversation with the plaintiff. Mr. Hendry testified that he asked the plaintiff what was wrong, and plaintiff replied "it is all wrong;" that Hendry then said that if plaintiff would send a check in full he (Hendry) would send men up and "make it over" to plaintiff's satisfaction, "no matter what it costs;" that plaintiff refused this offer; that Hendry then offered to send the men back who did the work, but plaintiff replied that he would not have defendant's men "up there;" that Hendry then said that "rather than have any trouble," he would allow plaintiff to deduct from the bill all that had been charged for extras and plaintiff could then hire his own men and do the job to suit himself and thus end the matter, saying: "You send me a check for $1025, and that closes the matter for good." Mr. Hendry further testified that he "got the check the next day," and that nothing further was said about the matter until nearly a year thereafter, when plaintiff asked him to "come up and see the kind of a job you have done." Defendant's secretary corroborated Hendry as to Hendry's part of the telephone conversation, including his offer to "knock off the extras" and "take the contract price and call the job settled;" and there is no dispute that the check for the contract price, without extras, was sent by plaintiff the day after this offer was made. Plaintiff's version of this telephone conversation was that he refused to pay anything for the extra work, but agreed to pay the amount of the contract price notwithstanding the alleged defects in the work, upon the promise of Mr. Hendry that he would "make it right." Plaintiff testified that he owed defendant for forty-one hours of extra work and that he told Hendry he was willing to pay that, but that Hendry told him to "forget it;" and he also testified that a year later, when he asked Hendry to "make his promise good," Hendry stoutly denied that he had made any such promise, and insisted the matter had been settled when the

check was sent.

After a careful examination of the evidence, we are of the opinion that the clear preponderance of the evidence upon the question of accord and satisfaction is with the defendant, and that the finding and judgment of the court, therefore, are manifestly against the weight of the evidence. The story told by defendant's president regarding the settlement is reasonable and probable, and is corroborated, while that of the plaintiff is not only uncorroborated, but is very improbable. The judgment is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Barnes, P. J., and Gridley, J., concur.

346 - 30199

FINDING OF FACTS.

The court finds that there was a dispute between the parties as to the quality of materials and the character of the labor furnished by defendant to plaintiff under the contract in evidence; that extra work, not contemplated by the contract, was also performed and a dispute arose about that; that these disputes were settled by mutual agreement after the work was all finished, and that plaintiff's check for $1025, the original contract price, was sent to defendant and received by defendant in full settlement of the controversy between the parties.

1 - 29105

G. C. ADAMS, as Executor of the Last Will and Testament of Ella M. Brown, Deceased, et al., Defendants in Error,

vs.

FRANK BROWN, Plaintiff in Error.

239 I.A. 644

ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Frank Brown seeks to reverse a decree of the Circuit court of Cook county, entered during the lifetime of Ella M. Brown, on June 21, 1923, wherein she was granted a divorce from him on the ground of extreme and repeated cruelty, and wherein it was further ordered

> "that the defendant, Frank Brown, give to the complainant, Ella M. Brown, a quit claim deed to the property known as 4101 Vincennes avenue *** in lieu of all alimony and $250 solicitor's fees, $150 doctor's bill, $72 back alimony, $133.33 taxes for 1923, $60 for June, 1923, payment on the contract, and $120 for nursing complainant during her present illness; *** and quit claim and assign all of his right, title and interest in said property to said Ella M. Brown, in consideration of the settlement of the above claims and demands, which are found to be due from him to her; and, if said Frank Brown refuses to assign and convey the said interest as is hereby ordered, the clerk of this court is hereby empowered to sign and convey said right, title and interest to said Ella M. Brown; and it is further ordered that Frank Brown give possession of said premises immediately."

On March 5, 1924, the transcript of the record was filed in this Appellate court. On March 28, 1924, plaintiff in error appeared and suggested the death of Ella M. Brown on September 16, 1923, and moved that he be given leave to amend the praecipe, writ of error, and all papers by making G. C. Adams, as executor of her last will, Maggie McKinnon and Annie Newsom, beneficiaries under the will, parties defendant in error. The motion was supported by an affidavit in which a copy of the will, executed on March 21, 1923, was set forth. This is proper prac-

tice. (Chatterton v. Chatterton, 231 Ill. 449.) By the terms of the will Ella M. Brown appointed O. C. Adams as executor, and bequeathed to her daughter, Annie Newsom, the sum of one dollar, and devised and bequeathed to her cousin, Maggie McKinnon, "all of my right, title and interest in my home that I am now purchasing jointly with Frank Brown, against whom I now have a suit pending for divorce, and two Metropolitan Life Insurance policies, amounting to approximately $250, and all of my furniture, fixtures and wearing apparel, as well as all other property either real or personal that I may die seized and possessed of." The motion was granted and the cause was continued for service. On April 21, 1925, a brief and argument on behalf of all defendants in error was filed.

The present transcript discloses that on March 25, 1922, Ella M. Brown filed her bill in the Circuit court against Frank Brown, praying for a divorce, and also praying that said Frank Brown be enjoined, pendente lite, from selling, encumbering, or otherwise disposing of any of his real or personal estate, and that she be awarded temporary and permanent alimony and also costs and solicitor's fees. No further relief was prayed for specifically and there was no prayer for general relief. She set forth in the bill her marriage to Frank Brown on May 26, 1920, her cohabitation with him as his wife until January 30, 1922, and several specific acts of cruelty by him to her on August 8, 1921, February 13, 1922, and March 11, 1922. She further alleged that he is a "joint purchaser" with her of the property known as 4101 Vincennes avenue, Chicago; that the property was purchased "on a contract" to pay $500 cash and $60 a month until $4500 is paid; that she has kept up the payments for several months out of her own earnings and savings and contributed to the original payment;

that she has no other property either real or personal and no means wherewith to support herself or to defray the costs of this proceeding; and that defendant is employed and earns $5.00 per day, and is abundantly able to contribute to her support, which he refuses to do. Defendant in his answer denied the charge of cruelty, but admitted that he was a joint purchaser with complainant of the Vincennes avenue property and upon the terms mentioned in the bill. Shortly after its filing defendant was ordered to pay complainant $8 per week as temporary alimony. On July 8, 1922, this allowance was increased to $12 per week, and on January 6, 1923, was fixed at $10 per week.

On March 23, 1923, complainant filed a verified petition in the cause, alleging in substance that defendant was back in his alimony payments; that complainant was ill in bed suffering from a cancer; that her physician had informed her that an operation was necessary to save her life, and that the operation and hospital expenses would cost about $550; that she was wholly without funds and unable to work, and thereby unable to make the future monthly payments on the Vincennes avenue property, in which her and defendant's interest as joint purchasers now amounts to about $1500; and that she was unable to borrow any money by pledging her interest in said property because defendant had refused to sign with her their joint pledge or assignment of said interest. She prayed for an order directing that said defendant, Frank Brown, "assign or join in a joint assignment" with her of the Vincennes avenue property "for the purpose of raising sufficient money to pay for the operation, hospital fees and other medical attention as above set forth." It does not appear that any action was taken by the court on the petition.

The transcript further discloses that, by stipulation of the solicitors for the respective parties, a dedimus or commis-

sion was issued out of the clerk's office to take the deposition on oral interrogatories of complainant at her bedside at No. 4101 Vincennes avenue, Chicago, on May 11, 1923, before Jesse B. Baker, as commissioner, and that said deposition was then and there taken, the complainant being examined and cross-examined by the respective solicitors. This deposition was returned and filed with the clerk on May 31, 1923, and appears in the transcript.

In the decree in question there is the recital that the cause came on for hearing, at which the defendant was represented by his solicitor, and that testimony was taken in open court in support of complainant's bill. And the court finds that it has jurisdiction of the parties and of the subject matter; that complainant is, and was for more than a year next before the filing of her bill, a resident of Cook county, Illinois; that the parties were married in the year 1920, and lived together as husband and wife until January 30, 1922; that "subsequent to their marriage the defendant has been guilty of extreme and repeated cruelty to complainant as charged in complainant's bill;" that on August 16, 1920, the parties purchased the Vincennes avenue property (describing it), "making a payment of $600 down and contracting to pay a further sum of $60 per month; that Ella M. Brown contributed $250 and Frank Brown $350 toward the initial payment; and that all subsequent payments, at the rate of $60 per month, have been made by Ella M. Brown by renting rooms and working by the day and by washing and ironing." The court further finds that "Mrs. Brown is now sick and confined to her bed and is unable to be removed from the premises on account of a lingering disease which is diagnosed to be a cancer; that there is due $250 as solicitor's fees to C. C. Adams, her solicitor, $150 doctor's bill, $72 back alimony, $133.33 taxes for 1923, $60 for payment on contract for June, 1923, and $120 for nursing complainant for her present illness, amounting to the sum of $785.33, due and owing by the defendant to the com-

plainant, and that the equity of the defendant, Frank Brown, in the premises does not exceed $800."

Counsel for plaintiff in error do not specifically complain of that portion of the decree which grants an absolute divorce to complainant. While there is no certificate of evidence contained in the transcript, the particular acts of cruelty, as charged in the bill, are amply sustained by the testimony given by complainant in her said deposition, contained in the transcript. It appears that she was examined and cross-examined at considerable length in reference to said acts of defendant. Counsel complains of the other part of the decree, wherein the court directs that defendant (plaintiff in error) quit claim and assign to complainant all of his right, title and interest to the Vincennes avenue property, in lieu of the payment of permanent alimony and of the several items, aggregating $785.33, mentioned in the decree as being due from him to her. It is contended that said other part of the decree is erroneous because (1) the particular relief granted does not come within the scope of the bill or conform to the prayer thereof; (2) it is not supported by evidence preserved in the record, by certificate of evidence or otherwise; and (3) it in effect takes away from defendant substantially all of his property, viz, his one-half interest in said Vincennes avenue property or contract, in lieu of his paying permanent alimony, and in consideration of his not being liable to pay certain solicitor's fees, the back alimony mentioned, and certain other items mentioned which the evidence does not show he is legally liable to pay in their entirety.

As to counsel's first point, we think it is well taken. (Risser v. Avers, 294 Ill. 241, 244). As to counsel's second point, the only evidence contained in the present record is complainant's testimony given in said deposition, and such

testimony does not, in our opinion, support the part of the decree complained of. She testified:

> "Mr. Brown and I purchased the house known as 4102 Vincennes avenue. At that time I had $250, which I put up as part of the first payment. He put up the other $250. *** The contract was taken in the joint names of myself and Mr. Brown. I have kept up every payment since January. In January he told me that he would not give me a nickle on it, that he did not want it, and that if he had known what he knows now he would not have started to buy it.** To keep up the payments I got some money from the tenants, and some alimony that I got from him I applied on the payments. I made up the rest by washing and ironing. *** I paid the taxes for 1921 during the year 1922. I borrowed the money to do so. ** This year's taxes, amounting to $133.33, have not been paid, and I received notice from the owner, Mr. Harman, that unless they were paid the contract would be forfeited."

As to counsel's third point, we are of the opinion, in view of the pleadings and such evidence as is contained in the present transcript, that the trial court was not warranted in ordering defendant to quit claim and assign his one-half interest in the Vincennes property to complainant. It is found in the decree that defendant had an equity in the property in an amount not exceeding $300; and the decree, if carried out, divests him entirely of his interest therein and gives it to complainant. This action is objectionable. (Ross v. Ross, 78 Ill. 402, 404; Keating v. Keating, 48 Ill. 241, 242; Wilson v. Wilson, 102 Ill. 297, 300.) And if the property can be considered as a homestead estate, we do not think that it is disposed of by the decree according to the equities of the case. (Sec. 5 Exemptions Act; Bobowski v. Bobowski, 242 Ill. 524, 530.)

Accordingly that part of the decree awarding complainant an absolute divorce from defendant as of June 21, 1923, is affirmed; and that part of the decree wherein Frank Brown is ordered to quit claim and assign to complainant all of his right, title and interest in and to said Vincennes avenue property, and to give up possession thereof immediately, is reversed and the cause is remanded to the Circuit court.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

Barnes, P.J., concurs. Fitch, J., dissents.

87 - 29496

A. KNEISEL et al.,

v.

URSUS MOTOR COMPANY et al.

CHICAGO TITLE & TRUST CO., as Receiver of the Ursus Motor Company,
Appellee,

v.

FRANK A. HELMER, FRANK I. HOULTON, LLOYD C. WHITMAN, ROLAND D. WHITMAN and CHARLES R. HOLTON,
Appellants.

239 I.A. 644

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this appeal to reverse an order of the Circuit court of Cook County, entered May 16, 1924, dismissing for want of equity appellants' petition, filed November 22, 1923, in the pending chancery cause of Kneisel et al. v. Ursus Motor Company et al., (hereinafter referred to as the Ursus case). Appellants were associated together, as a firm, in the practice of law in Chicago, and the order denied them the right to receive from the assets of the Motor Co. the sum of $2317.50, for legal services (including cash disbursements) rendered by Lloyd C. Whitman in June, July and August, 1922, at the request of Jacob Goldman, then acting as receiver of the Motor Co. The original bill was filed by minority stockholders of the Motor Co. on March 2, 1922, and prayed for an accounting, a receiver, and other relief, and on that day Goldman was appointed and qualified as receiver.

On April 23, 1923, by direction of the executive committee of the judges of said Circuit court, a lengthy investigation was commenced before Judge Scanlan, one of said judges, concerning the fitness of Goldman to continue to act as receiver in the Ursus

case and in many other causes pending in the court in which he had been appointed receiver. On May 5, 1923, the Court (Judge Scanlan), upon "its own motion and upon evidence heard in open court," ordered that Harry J. Myerson, E. A. Zimmerman, Lloyd C. Whitman and Meyer N. Rosengard be removed as solicitors for Goldman, receiver in the Ursus case, and appointed other solicitors in their stead. It was stated in the order that the Court "reserves jurisdiction to pass upon all matters including claims, if any, for services and disbursements by said solicitors, and including claims, if any, of the said estate against them by reason of any and all past transactions in any way arising out of or from their representation as solicitors for the receiver." On May 14, 1923, the court entered an order in the Ursus case removing Goldman as receiver and appointing in his stead the Chicago Title & Trust Co., which took possession and entered upon its duties. In this order the court reserved jurisdiction to pass upon and determine all matters or claims by or against Goldman, including all claims and liens by Goldman for services and disbursements, and further ordered that within 10 days he file with the clerk a full and complete account under oath of his acts, doings, receipts and disbursements. Goldman failed to file such account.

On September 26, 1923, the court entered a draft order, entitled in the Ursus case and containing a recital and findings, in which Lloyd C. Whitman in the alternative was directed either to pay in open court to said new receiver, Chicago Title & Trust Co., by 10 o'clock on the morning of October 10, 1923, the sum of $2517.80, subject to his right to be reimbursed for legal services rendered to Goldman, receiver, "or, in default ** of such payment, ** that he then and there, in open court, show cause, if any he have, why he shall not have complied with this order and

rule." And it was further ordered that, if said payment was made, he be given leave within 60 days "to file his intervening petition or petitions, making claim for services rendered by him" to said Goldman, "or contesting the propriety of this order directing the repayment as aforesaid of said sum of $2317.50, or any part thereof." In the order it is recited that the cause coming on to be heard "upon the court's own motion to investigate the conduct of Jacob Goldman, as receiver," and his fitness to continue as receiver, and to determine whether he has in his possession and control the estate which came to him as receiver, and "to discover and recover such of the assets of the estate which the court should find have been improperly expended by said receiver," and the court, "having heard the evidence, adduced in open court, including the testimony of Jacob Goldman and of Lloyd C. Whitman," finds that it "has jurisdiction of the parties hereto and of Jacob Goldman and of Lloyd C. Whitman, and of the subject matter;" that Goldman, as receiver, has collected assets belonging to the estate and has paid therefrom to said Whitman the sum of $2317.50, "in two payments, one by check No. 9087, on the National Produce Bank of Chicago, dated October 13, 1922, in the sum of $1750, and the other by check No. 9408 on said National Produce Bank, dated November 23, 1922, in the sum of $567.50, which payments said Whitman claims were for legal services rendered to said Goldman as receiver in this cause;" that each of the two payments was made to Whitman "without any order of this court first had and obtained," authorizing said payments, and no order has ever been entered authorizing the payments; and that Whitman "is now wrongfully withholding" said sum, and he has refused the demand of the new receiver, Chicago Title & Trust Co., to pay the same to it.

Whitman did not make the payment, but exercised the second alternative mentioned in the order, and, on October 23, 1923, after an extension of time had been granted him, filed a sworn

answer to the rule to show cause. He set forth various reasons why he should not be required to make the payment, and further alleged that the law firm of appellants had received the moneys in discharge of bills rendered by it, that while the checks were made payable to his order he had endorsed them over to the firm and they had been deposited to the credit of the firm in its bank account, that said firm had been dissolved on December 31, 1922, and that under the circumstances all members should be required to respond to the rule rather than he alone. On October 26, 1923, the other four members of the firm voluntarily filed their sworn petition, entitled in the Ursus case, alleging that said Whitman's interest in said firm was a fractional one, and that, if any portion of said sum was to be surrendered, the equities between the various members required that the payment should be made by all, in proportion to their respective interests in the firm. They prayed that they be made co-respondents with Whitman to said order of September 26th, and on the same day, October 26th, they, together with Whitman, paid in open court $2317.50 to the new receiver, Chicago Title & Trust Co. And on the same day the court entered the further order setting up the fact of such payment, subject to conditions, and directing that the new receiver hold the money subject to the further order of the court. The conditions mentioned were that "nothing in this order contained, nor the payment or payments" by said five members of the firm, "shall in anywise prejudice or conclude" them "as to any right or rights, or claim or claims of right, by them shown or made ** by said answer of Lloyd G. Whitman to said rule to show cause or by said petition," filed by said firm, or which may hereafter be shown or made by them. And it was further stated in the order that "leave is given" to said five members of the firm within 60 days "to file their further petition or petitions, motion or motions, presenting any and all rights or claims ** for services and disbursements

rendered or made by them to or for said Jacob Goldman, as receiver in this cause or otherwise, and including any other lawful claims or demands which they may have against this estate, or to said $2317.50, or any part thereof."

On November 22, 1923, pursuant to the last mentioned order, the five members of the firm (appellants) filed their petition (entitled in the Ursus case and sworn to by said Whitman), in which after making many allegations they prayed that the court "direct said Chicago Title & Trust Co., receiver, to forthwith return ** said $2317.50, paid by respondents October 26, 1923, and that they go hence without day, or ** that the court fix their reasonable and proper compensation, ** including their cash disbursements, and declare and decree a first lien therefor upon the assets of said estate" in their favor. They denied that the court had jurisdiction of the subject matter or to enter said orders of September 26th or October 26th. They denied that the $2317.50, paid by Goldman to them by the two checks, signed "Jacob Goldman, Receiver," was paid out of assets belonging to the Ursus Motor Co. estate. They alleged in substance that shortly after Goldman was appointed receiver of said estate, and prior to March 7, 1922, a petition in bankruptcy was filed in the U. S. District Court at Chicago against the Ursus Co., charging as the act of bankruptcy that subsequent to the commencement of the Ursus case in the State Circuit court the directors of the Ursus Co. adopted a resolution admitting its inability to pay its debts and a willingness to be adjudged bankrupt; that on March 6, 1922, an order was entered in said circuit court giving leave to Goldman, receiver, to pay the unsecured creditors of the Ursus Co., then supposed to have claims of about $6000; that on March 7, 1922, on application of the Federal Court receiver, said circuit court directed Goldman to turn over all property of the Ursus

Co. in his possession as receiver, to said Federal Court receiver, which he thereafter did; that the property as turned over consisted of about $7,000 in bonds, certain Chicago real estate subsequently sold for about $69,000, certain machinery in Chicago subsequently sold for about $21,000, and certain stock owned by the Ursus Co. in a plant in Warsaw, Poland; that on March 30, 1922, said circuit court entered an order directing Goldman, as receiver, to issue receiver's certificates in an amount not to exceed $15,000, for the purpose of paying the claims of the creditors of the Ursus Co.; that on June 9, 1922, Goldman employed Lloyd C. Whitman, of appellants' said firm, to bring about if possible the dismissal in said Federal Court of said bankruptcy proceedings, and the return of the assets of the Ursus Co. to the custody and control of said circuit court; that at that time Goldman advised Whitman of the situation of affairs, that pursuant to orders of said circuit court an offer had been made in said Federal court to pay all unsecured creditors of the Ursus Co. the full amount of their claims, and that said Federal Court at one time had announced that the offer would be accepted and said bankruptcy proceedings dismissed, but thereafter had receded from that position; that Whitman as a member of appellants' firm accepted said employment, it being stipulated and agreed that the charge for the services would be at the rate of from $100 to $200 per day, depending upon the time consumed and the results effected, and that all incidental cash disbursements or advances should also be paid by Goldman; that pursuant to said employment Whitman rendered legal services in office and in court from June 9, 1922, to August 24, 1922, at the rate of $150 per day or less, amounting to $2317.50, including cash disbursements of $70, and said firm rendered bills to Goldman therefor; that on July 14, or 15th, 1922,

an order was entered in said Federal Court dismissing the bankruptcy proceedings and directing the transfer of all assets in the hands of said Federal Court receiver to said Goldman, as receiver in said circuit court; that the charges for said services were fair and reasonable and that the dismissal of the bankruptcy proceedings was the direct result of said services; that the bills rendered for said services and disbursements were paid by two checks, signed "Jacob Goldman, receiver," and payable to Whitman's order, which checks were by him endorsed and deposited to the credit of appellants' firm with its bank in good faith, and in the usual course of business, and that said payments were made "without any order of said circuit court."

It is further alleged in the petition in substance that the language in the order of September 26, 1923, (viz, that the cause came on to be heard "upon the court's own motion to investigate the conduct of Goldman as receiver") refers to occurrences and examinations of certain individuals before Judge Scanlan, commencing April 23rd, and continuing until after July 16th; that the language in the order of September 26th (viz, "having heard the evidence adduced in open court, including the testimony of Jacob Goldman and Lloyd C. Whitman") refers to evidence heard by said judge in the course of said occurrences and examinations, during which from time to time orders were entered by said judge in the Ursus case and also in some "of the 297 other causes in which said Goldman had at one time or another acted as receiver;" that said occurrences and examinations "were not had upon any issue made or pending in said court, and were not in form or substance adversary proceedings upon any report or reports of said Goldman as receiver, or upon any petition against, or order upon, these respondents or any of them, or upon any issue tendered them, and they were in no way a party to any of said

occurrences and examinations, except that said Lloyd C. Whitman appeared in court upon the same, at least part of the time, as attorney for said Goldman, and upon several occasions was called to the witness stand by Judge Scanlan and interrogated as a witness;" that about June 21st said Whitman was examined as a witness concerning said two checks, given him by Goldman and aggregating $2317.50, and Judge Scanlan stated that the court was of the opinion that said Whitman should return said moneys, that said Whitman should think the matter over and later advise the court if an order of court was necessary as a condition precedent to the paying back of said moneys by said Whitman, and that if he paid back the moneys an order would be entered fully protecting him as to his rights therein, if any he had, just as other orders had previously been entered protecting the rights of many other solicitors who had received payments from Goldman for services claimed to have been rendered to him as receiver in other causes; that thereafter, about September 19th, he was advised by one of the solicitors for the new receiver that Judge Scanlan desired his presence again in court as a witness, and he accordingly again appeared before said judge on September 26th, whereupon said judge exhibited the draft order of September 26th, caused it to be entered by the clerk, and Whitman then and there was served with a copy thereof; that on said day "no evidence or proofs were adduced or heard in the premises," and said Whitman was not present except as a witness; and that said order of September 26th, and its said service upon Whitman, "is the inception and constituted the institution of the only proceedings," either in said Ursus case or otherwise, "raising, presenting or laying legal basis for the determination or adjudication as against said Whitman, and, as enlarged by said order of October 26th, as against these respondents, of any of the matters in said order of

September 26th, recited, found, alleged, ordered ** or alluded to."

It is further alleged in the petition, upon information and belief, that "the only basis for the finding or charge that said $2317.50 was paid out of assets belonging to the estate in said cause" (Ursus Motor Co.) "is the fact, as the fact is, that said two checks, mentioned in said order of September 26th, were drawn by said Goldman upon an account in the National Produce Bank, which account was carried by him under the name and style of 'Jacob Goldman, Receiver,' and that in said account said Goldman, prior to October 13, 1922, had deposited moneys ** which were proceeds of assets or property of said last mentioned estate, theretofore sold by said Goldman as receiver, ** under orders of said circuit court;" that Goldman, during a period beginning about October, 1912, and continuing thereafter until about April, 1923, was acting by appointment of the circuit court and other courts as receiver in a large number of estates, and during said period usually deposited in his said account in said National Produce Bank all funds coming into his hands from all of the estates in which he was acting as receiver, "without in any way preserving in said account the identity of any such moneys so deposited as being the moneys of any particular one of such estates, and in like manner, during the same period and from time to time, deposited his own personal funds in the same account;" and that, when the two checks, aggregating $2317.50, were delivered and paid, the balance on hand in Goldman's said bank account was a balance of personal funds, and of funds coming into his hands as receiver in many estates other than the Ursus estate, though perhaps including some funds in that estate.

The new receiver, Chicago Title & Trust Co., did not file an answer to appellants' petition and it does not appear that

any rule upon it to answer the same was ever asked or made. Commencing in the last week of April, 1924, there was a hearing upon the petition, at which Lloyd C. Whitman testified at great length in behalf of appellants, and Judge Francis S. Wilson, chief justice and member of the executive committee of the circuit court in April, 1923, testified as a witness for the new receiver. Much written evidence, consisting of court orders, etc., also was introduced. At the commencement of the hearing appellants questioned the jurisdiction of the court, as to the parties and subject matter, to enter said orders of September 26 and October 26, 1923, and their motion, that said sum of $2317.50 (deposited by them with the new receiver on October 26, 1923) be returned, was denied. Treating their petition as an answer to the previous rules entered by the court upon them rather than as a petition seeking affirmative relief, they then moved that the new receiver first present such evidence as it cared to introduce. The court in effect ruled that the burden was upon appellants to support their petition by proof, showing that they were entitled to said sum of $2317.50. Thereupon said Whitman took the witness stand.

After a review of the entire record, we are of the opinion that under the facts and circumstances disclosed the court had jurisdiction of the parties and the subject matter, that it had the right and power to enter said orders of September 26th and October 26th, and that the burden of proving the allegations of appellants' petition rested upon them. (See opinion filed by this appellate court July 14, 1925, in the Myerson case, No. 29474).

The evidence tends to show that when Whitman was first employed by Goldman, June 9, 1922, it was an employment by the latter personally, rather than as receiver. Whitman testified:

"When Goldman came to me to employ me, I told him I would not accept employment on the basis of what might thereafter be determined by the court was a reasonable fee, that I would tell him what I would charge, and if that was not a reasonable fee, he would have to stand it. I told him I would charge from $100 to $200 a day, depending on the outcome and the time consumed; that my understanding was that I was employed for a specific, definite purpose, to get these assets out of the hands of the United States Court; ***. It was Goldman's business to come into court and get any necessary order that he required; suppose I got licked in the Federal Court, I expected Goldman to pay me out of his own pocket; **." And the evidence discloses that it was not entirely through Whitman's efforts in said Federal Court that said bankruptcy proceedings were dismissed by said Court about July 15, 1922; that when the two checks, signed "Jacob Goldman, receiver," were given to Whitman in payment of the bills for the services rendered by Whitman, the circuit court was not advised and no order of court was entered authorizing said payments; that said checks were drawn on a bank, and paid out of an account known as "Jacob Goldman, receiver," in which Goldman had mingled with funds of the Ursus Co. estate funds of the other estates in which he was receiver; that there were funds of the Ursus Co. estate in the account at the time when the checks were received by Whitman and by appellants and when paid to appellants by the bank; and that all of the funds were trust funds and not the property of Goldman personally. The fact that the checks were signed "Jacob Goldman, receiver," was notice to Whitman and appellants that the funds on which they were drawn were receivership and trust funds, and not Goldman's personal funds. (Squire v. Ordemann, 194 N. Y. 394, 396; Lamson v. Beard, 94 Fed. Rep. 30, 44; Rothstein v. Grossberg, 222 Ill. App. 228, 234). And, when the two payments

by said checks were made, the circuit court was not advised of the fact and it had not authorized the payments. We think that under the facts and circumstances disclosed such authorization should have been obtained. (Hooper v. Winston, 24 Ill. 353, 366; Heffron v. Milligan, 40 Ill. App. 291, 294; Henry v. Henry, 103 Ala. 582, 597).

After a review of the entire abstract of the record and the exhaustive briefs of counsel, we are of the opinion that the circuit court, under the evidence, was fully warranted in dismissing appellants' petition for want of equity, thereby refusing to direct the new receiver of the Ursus Motor Co. to return to them said sum of $2317.50, or any part thereof. They complain of certain alleged errors made by the court in rulings on evidence during the hearing. If there were errors they were not such as require a reversal of the court's order of May 16, 1924, dismissing the petition, which is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

178 - 30030

WILLIAM R. VAN CORTLAND,
Appellee,

vs.

HARLIN O. PRICE,
Appellant.

239 I.A. 645

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE CRINLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced a 4th class action in contract in the Municipal court of Chicago against defendant, claiming an indebtedness of $35, due on defendant's promissory note. Defendant was served with process, and October 15, 1924, there was a hearing before the court without a jury, resulting in the court finding the issues against the plaintiff and entering judgment against him for costs. Plaintiff prayed and was allowed an appeal conditioned upon his filing his appeal bond within 30 days. Nine days later, on October 24th, and before he had filed such appeal bond, plaintiff appeared before the same Judge who had rendered the judgment, and moved the court to vacate said orders of appeal, judgment and finding, and the common law record before us discloses that the court, "being fully advised," sustained the motion, and that thereupon plaintiff moved that he be non-suited, and that thereupon the court, complying with the motion, ordered that the suit be dismissed at plaintiff's costs. From this order of dismissal defendant prayed and perfected the present appeal.

Defendant's counsel contend that the court was without jurisdiction to vacate the said orders of appeal, judgment and finding, entered on October 15, 1924. There is no merit in the contention. It is well settled that a term of court is regarded as but a single day or unit of time, and all acts done

within that term are regarded as contemporaneous; and that during the term at which a judgment or decree is entered the record remains in the breast of the court, and the court may, at any time during the term, amend it or set it aside on its own motion, or for good cause shown, as justice may seem to require. (Kreiger v. Kreiger, 231 Ill. 479, 484; Bushnell v. Cooper, 289 Ill. 260, 267.) In the Municipal court of Chicago there are no stated terms of court, but the court does not lose jurisdiction to change its judgments or orders until 30 days from the time of their entry. (Sec. 21 Municipal Court Act.) In the present case it appears that said orders of nonsuit, judgment and finding, entered on October 15, 1924, were vacated and set aside by the court within nine days after their entry. And in the absence of a bill of exceptions it must be presumed that the court's action in setting aside said orders was justified by matters then presented. (People v. Leutschell, 190 Ill. App. 20, 22.) And said orders having been vacated and set aside, the case was in the same position as if no trial had been had, and plaintiff could ask for, and the court could grant, a non-suit at plaintiff's costs. (Sec. 70 Practice Act; Sec. 30 Municipal Court Act; Edwards v. Edwards, 22 Ill. 121, 123; Shelton v. Van Vleck, 106 Ill. 45, 48.)

The order dismissing plaintiff's suit at his costs is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

4699a

232 - 30085

HELEN LIPINSKI,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

239 I.A. 645

APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this appeal to reverse a judgment for $5,000 rendered against the City of Chicago after verdict by the Superior court of Cook county on February 7, 1935, in an action for damages for personal injuries received by plaintiff on March 19, 1933, by reason of a defective sidewalk in front of No. 1734 West 19th street, Chicago, of which defect, plaintiff charged in her declaration, the City had either actual or constructive notice.

On the day of the accident plaintiff, an unmarried woman under thirty years of age, was walking west on the north side of West 19th street, between Wood and Paulina streets, accompanied by her sister. They carried a basket containing clothes between them. The sidewalk was covered with snow. Suddenly the heel of one of plaintiff's shoes went into a small hole in the sidewalk, causing her to fall down and resulting in the fracture of one of the bones of her right leg and other injuries. In this particular section of the city the abutting lots are a few feet below the level of the sidewalk and the space underneath the sidewalk is sometimes used by the owner of a particular lot for toilet or storage purposes. In front of the lot known as No. 1734 West 19th street there was a toilet, and above the toilet and in the sidewalk there were

nine or ten round glass prisms, arranged in a square, each of which being about 2½ or 3 inches in diameter. A number of witnesses called by plaintiff testified that one of these glass prisms had been out of its setting for a long period of time, causing a round hole in the sidewalk. Their estimates as to the time the hole had been there prior to the accident varied from about seven months to about three years. Some of defendant's witnesses testified that although they had frequently walked on the sidewalk they had not seen any hole in the sidewalk. It was in this hole that the heel of plaintiff's shoe was caught, causing her fall and injuries. She was taken to a hospital and placed under the care of Dr. Harry Jackson, a surgeon on the hospital staff. Her ankle remained in a cast for about a month. It was sixteen weeks before she could put her foot on the floor, and she used crutches for about six months. There was a fracture of the right fibula about four inches above the ankle, a spreading of the ankle joint between the fibula and tibia so as to lower the joint, and a bad alignment of the fragments, with a sharp portion of the bone projecting downward. Physicians testified that such injuries made it difficult and painful for plaintiff to work while standing on her feet, and that the injuries were permanent. Prior to the accident she was working in a laundry, ironing men's shirts by means of a machine, and in her work she was required to stand constantly on her feet, operating a lever with one of them. She was paid $23 per week. She did not return to work for more than a year after the accident, and was obliged to take up such laundry work as allowed her to sit down a part of the time, for which she was paid $12 per week.

Counsel for the City urge as grounds for the reversal of the judgment (1) that the verdict is contrary to the law and the

evidence, in that there was no credible evidence of constructive notice to the City of the existence of the hole, and plaintiff's injuries were caused by her slipping on the ice and snow which covered the sidewalk at the time; (2) that the verdict is excessive; and (3) that the court erred in refusing to strike out on defendant's motion certain testimony of plaintiff's witness, Dr. Harry Jackson. We have carefully considered the evidence and do not think there is any merit in any of counsels' points. As to the first, it is well settled law in this State that it is the duty of a city to keep its streets and sidewalks in a reasonably safe condition for persons to travel over, and that when a sidewalk on a public street gets out of repair, so that it is unsafe to travel upon, and so remains for a considerable time, notice of the defective condition of the walk will be presumed. (City of Chicago v. Dalle, 115 Ill. 386, 389; Hamm v. City of Chicago, 168 Ill. 551, 557). And the evidence, by a clear preponderance, discloses that this hole in the walk had remained there for a long period of time prior to the accident, and that plaintiff's injuries were caused by the heel of her shoe getting caught in this hole, and not because she slipped on the snow or ice which covered the walk at the time. And we cannot say that the verdict was too large. Plaintiff received serious and permanent injuries. She suffered much pain. She was compelled to remain away from her work for more than a year. She lost her wages during that period and when she was able to return to work her earning capacity in her particular line of work was materially lessened because of her inability to stand on her feet for any considerable length of time. As to counsels' third point, the abstract of the record discloses that near the end of Dr. Jackson's cross examination he stated in substance that a few

days before testifying he had examined the records of the hospital at which he had treated plaintiff following the accident; that these records were not kept by himself; that they had refreshed his recollection, and that he doubted whether, if his recollection had not been so refreshed, he would have remembered much about plaintiff's case. And counsels' argument is in substance (citing the cases Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, and Iroquois Furnace Co. v. Elphicke, 206 Ill. 411) that certain of the witness' testimony was incompetent because based upon memoranda not kept by himself and not known by him to be correct, and because he did not appear to have a sufficient independent recollection after reviewing said memoranda as to certain facts about which he testified. We do not think that the court committed reversible error in refusing to strike out the testimony in question. It was not based entirely upon said records, but also upon his examination of an X-ray plate (otherwise identified) of plaintiff's leg and his examination of plaintiff a few days before the trial, all of which refreshed his recollection, as he stated, of plaintiff's condition and injuries when he treated her in the hospital shortly after the accident. Furthermore, there was no dispute that plaintiff's leg was broken at the time of the accident, or as to the condition of the leg at the time of the trial or the permanent injury thereto. If there was a technical error committed by the court, as argued, it was a harmless one in view of the other evidence in the case. (Casey v. Chicago City Ry. Co., 237 Ill. 140, 144.)

The judgment of the Superior court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

245 - 30098

4700a

239 I.A. 645

MARLBOROUGH BUILDING CORPORATION,
Appellee,

vs.

FRANK J. DOUGLASS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 4, 1924, plaintiff caused a judgment by confession for $472.50 to be entered in the Municipal court of Chicago against defendant on a written lease for rent claimed to be due for the months of August, September and October, 1924, at $150 per month. The judgment included $22.50 for attorney's fees. The premises, leased to defendant from October 1, 1923 to September 30, 1925, consisted of an unfurnished apartment on the 5th floor of plaintiff's building at 400 Deming Place, Chicago. Defendant moved out of the premises on July 25, 1924, having paid the rent for that month.

On motion of defendant, the judgment was opened and he was given leave to defend, the judgment standing as security. He demanded a jury trial and filed an affidavit of merits, alleging that the premises "were uninhabitable because of noise and confusion, particularly in the night-time, in other premises in the same building;" that the partition between the bedroom, occupied by defendant and wife, and the kitchen in the apartment next to his was constructed of flimsy and thin material, which fact was unknown to defendant when he signed the lease; that the adjoining apartment was many times sub-let to transient tenants, who during each week, between the hours of midnight and 4 o'clock a.m., made use of the kitchen and created so much noise that neither defendant

nor his wife could sleep; that in these particulars plaintiff violated its covenant with defendant for the quiet and peaceful enjoyment of the premises by defendant; that plaintiff also "violated its covenant No. 9 in the lease and wholly refused to furnish heat to the premises, occupied by defendant, when necessary;" and that, because of the noise and confusion in the particulars mentioned and because of the lack of heat "plaintiff created a forceful eviction of defendant."

On the hearing before a jury plaintiff made out a prima facie case by introducing the lease and showing that the rent for the three months mentioned, aggregating $450, was unpaid. There was a provision in the lease, in case judgment for rent was confessed thereon, that attorney's fees to the extent of 5% of the rent due might be added. Defendant offered certain evidence in support of its defense which, upon objection being made, the court refused to admit. Thereupon the jury were sent from the court room, and the court heard the offered evidence and other evidence as a tender of proof. Upon the jury being recalled they were instructed to return a verdict in plaintiff's favor for $472.50, which they did, and judgment was entered against defendant, confirming in all respects the prior judgment entered by confession, and defendant appealed.

In paragraph 2nd of the lease it is provided "that the tenant has examined and knows the condition of said premises and has received the same in good order and repair." In paragraph 5th it is provided "that the landlord shall not be liable in damages on account of any personal injury or loss occasioned by failure to keep said premises in repair, and shall not be liable for any damage done or occasioned by or from any boiler, plumbing, gas, water, steam or other pipes * *, or by reason of any defect, latent or patent, in, around or about said building, * * , or for any damages arising from acts or neglect of co-tenants or other

occupants of the same building * * ." In paragraph 9th it is provided "that the landlord shall furnish, without cost or expense to the lessee, * * from October 1 to June 1 in each year, steam heat when necessary."

In view of the provisions of the lease, even if all of defendant's evidence which the court heard had been presented to the jury, we think that the court would have been justified in instructing the jury to find the issues for the plaintiff, as the court did. The evidence did not show that plaintiff violated its covenant, as contained in paragraph 9th of the lease, to furnish steam heat when necessary up to June 1, 1924, but only showed that the furnishing of the heat was accompanied sometimes by unpleasant noises in the radiators, and also that defendant was disturbed occasionally by other tenants making noises in the apartment immediately adjoining. Defendant relied upon these noises as constituting a constructive eviction, justifying his abandonment of the premises on July 26, 1924. But as to the noises accompanying the furnishing of heat defendant's evidence did not show that they were the result of concealed defects in the heating system, which were known to plaintiff when the lease was signed, and, therefore, the case of Scudder v. Marsh, 224 Ill. App. 355, relied upon by defendant's counsel, is not in point. And as to the noises made by other tenants in the adjoining apartment on occasional nights, these are not sufficient upon which to predicate a case of constructive eviction (Seaboard Realty Co. v. Fuller, 67 N. Y. Supp. 146.) Furthermore, defendant's evidence did not disclose that any of these noises, either in the radiators or in the adjoining apartment, occurred during the period of about two months immediately prior to defendant's abandonment of the premises. Hence, the conditions, which defendant claimed constituted a constructive eviction, did not exist when he abandoned the premises

and his remaining in possession and paying rent for only two months amounted to a waiver of his right to abandon the premises. (Leiferman v. Oaten, 167 Ill. 93, 101; Orsatt v. Isham, 73 Ill. App. 102, 104; Parks v. Freby, 130 Ill. App. 871, 872.)

In our opinion the judgment appealed from should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

4701a

254 - 30107

ANDERSON - LUNDGREN CUT STONE CO., a corporation,
Plaintiff and Appellee,

vs.

PATRICK MEEGAN, C. E. JOHNSON and JOHN E. COLNON,
Defendants,

PATRICK MEEGAN and JOHN E. COLNON,
Appellants.

239 I.A. 645

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, tried without a jury, the court found the issues against all three of the defendants and entered a joint judgment for $500 against them. Meegan and Colnon prayed and perfected the present appeal.

The controversy arises by reason of the refusal of the defendant, Colnon, doing business as John E. Colnon & Co., to accept and pay the following written order or bill of exchange:

"JOHN E. COLNON & CO.

410 South Clark St.

Chicago, May 25, 1923.

$500.00

Pay to Anderson-Lundgren Cut Stone Co., contractor for cut stone on the building at 6736-38 Crandon Ave., Five Hundred & No/100 Dollars, and charge to my loan on above building.

In full. (Signed) Patrick Meegan, owner
C.E.Johnson"

It is alleged in plaintiff's statement of claim in substance that on May 25, 1923, Meegan and Johnson made the said order and delivered it to plaintiff; that on the same day plaintiff presented it to Colnon and requested him to accept it and pay the

amount thereof, but that he, although at the time having moneys of the other defendant's in his possession with which to pay said amount, refused to accept the order or to pay said amount, of which facts Meegan and Johnson had notice; that by reason thereof Meegan and Johnson became liable to pay to plaintiff the said amount of $500, together with legal interest; and that all three defendants, although often requested, have refused to pay to plaintiff the said amount, to plaintiff's damage, etc.

The transcript of the record does not disclose that the defendant, Johnson, although served with process, ever filed an affidavit of merits. In the affidavit of merits of the defendants, Meegan and Colnon, it is alleged in substance that Colnon, on May 25, 1923, did not have moneys of Meegan and Johnson in his possession with which to pay the amount of said order and did not then or at any time thereafter accept said order; that said non-acceptance and non-payment of the same was caused by the failure of the defendant, Johnson, to comply with certain conditions, hereinafter mentioned, upon which said order was executed; that Johnson was the general contractor for the construction of said building, owned by Meegan; that Johnson, as such general contractor, entered into a sub-contract with plaintiff for the furnishing by it of the cut stone work in the building; that neither Meegan nor Colnon had any contractual relations with plaintiff; that after plaintiff had completed its work under said sub-contract Meegan refused to advance $500 to Johnson for the purpose of paying the balance claimed to be due plaintiff under said sub-contract, and upon the ground that its work had been done in a bad and unworkmanlike manner; that on May 25, 1923, a meeting was held in the office of Colnon, who had made a building loan to Meegan on the premises, and upon which he had from time to time paid out moneys as the work on the building had progressed; that at said meeting,

at which plaintiff's and Colnon's respective representatives were present and also Johnson and Meegan. Johnson agreed that he would allow Meegan $350 because of said claimed defective stone work and would pay said amount to Colnon and that Meegan should only be chargeable with $150 upon plaintiff's said claim of $500; that because of Johnson's said agreement Meegan and Johnson executed the said joint order on Colnon and then and there left the same with Colnon, but upon the conditions that the same would not be accepted or paid by Colnon, until said Johnson had deposited $350 with Colnon; that thereafter Johnson failed and refused to make said deposit, and Colnon, after waiting a reasonable time for such deposit to be made, notified plaintiff of Johnson's default, and afterwards surrendered possession of said unaccepted order to plaintiff "for the purpose of the rejection of the same and not of delivery, as claimed by plaintiff;" and that, by reason of the premises, neither Colnon nor Meegan are liable to plaintiff in any sum whatever.

Under the definition of a "bill of exchange," as contained in section 125 of the Negotiable Instrument Law (Cahill's Stat. 1923, p. 2369) we regard the order sued upon as a bill of exchange, of which Colnon was the drawee. In section 126 of said Law it is provided that "a bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same." And in section 131 of said Law it is further provided that "the acceptance of a bill is the signification by the drawee of his assent to the order of the drawer; the acceptance must be in writing and signed by the drawee." Clearly, under the pleadings and the evidence contained in the present transcript, the judgment against the defendant, Colnon, can not stand, and for the reason that he never accepted in writing the bill or order. And not having so accepted it he is

not liable to plaintiff even though at the time he had funds of the drawers in his hands. (8 Corpus Juris, p. 297, sec. 468; National Bank v. Second National Bank, 69 Ind. 479, 480.) And there being a joint judgment against all three defendants that judgment is a unit, which, being bad as to Colmon, must also be reversed as to the other defendants, Meegan and Johnson. (Seymour v. Richardson Fueling Co., 205 Ill. 77, 82; Lirak v. Chicago & Erie R. Co., 299 Ill. 218, 226.) Furthermore, after a careful review of the evidence, we are of the opinion that the finding of the court as to the defendant, Meegan, to the effect that he is liable to plaintiff to the extent of $500, is manifestly against the weight of the evidence.

For the reasons indicated the judgment appealed from is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Fitch, J., concur.

297 - 30150

4702

239 I.A. 645

GREGORY T. VAN METER, administrator of the estate of Stanley Opst, deceased,
Appellant,

vs.

CITY OF CHICAGO,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action against the City of Chicago for damages for negligently causing the death of Stanley Opst, a boy of about 11 years of age, the jury returned a verdict finding the defendant not guilty and, on November 22, 1924, judgment was entered in its favor and plaintiff appealed. The accident happened after dark about 9:30 o'clock on the evening of April 25, 1922. The boy died on the following day from the injuries received. The action was brought under the "Injuries" statute for the benefit of his next of kin.

There is no substantial dispute as to the material facts. The City was in possession and control of certain wires, used for the transmission of a high-powered electrical current of between 3500 and 4000 volts, and strung upon steel poles along Wentworth avenue. One of these poles was near the corner of 46th street and in Wentworth avenue, close to the sidewalk. It was about 30 feet high, and, commencing about 8 feet above the sidewalk, had a series of alternate steps about 18 inches apart, convenient for climbing. Near its top, and supported by a bracket, there was an electric lamp, used for lighting the streets at night, which was connected by other wires with the high-powered wires mentioned. Over the lamp there was a reflector made of metal, and uninsulated. It would be dangerous

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to the life of one climbing the pole if any part of his body came in contact with the reflector, of which fact the City throug h its agents had knowledge. The district was a thickly populated, residential one, and children frequently played on the sidewalks near the pole in the evening as well as the daytime. About 57 inches above the sidewalk there was a hole in the pole, 3-1/2 inches wide and 6 inches long, by means of which and a cable and other mechanism the lamp could be raised or lowered by an operator standing on the sidewalk. The mechanism had not been in use for some considerable time before the accident, yet the hole remained and furnished easy access to the lowest of the steps to one desiring to climb the pole. Young boys during their play often threw their hats upon some of the steps and then climbed up the pole after them. Police officers had warned boys that it was dangerous to climb the pole, and both of the deceased's parents who lived in the vicinity had warned the deceased not to climb the pole. On the evening in question the deceased, playing with other boys on the sidewalk near the pole, climbed it, using said hole and alternate steps, and in some manner, while the lamp was burning, came in contact with the reflector and "there was a blue flame" and he fell to the sidewalk, receiving burns and injuries causing his death.

Plaintiff's declaration, to which defendant pleaded the general issue, consisted of eight counts. Four of them were predicated on the theory that the pole presented an attraction and allurement to children playing in its vicinity to climb it, and that it was dangerous to one doing so, of which facts the defendant had knowledge. The deceased, being about 11 years of age, was not exempted from the exercise of all care for his own safety, but was required to use such care as a boy of his years, experience and knowledge would ordinarily use under similar circumstances. Whether,

under the circumstances, the City was guilty of negligence, or the deceased guilty of contributory negligence, were questions of fact to be determined by the jury under proper instructions. And whether the pole was so attractive to children, playing around it, as to suggest the probability of the accident was also a question for the jury. (Stedwell v. City of Chicago, 297 Ill. 486, 490.)

Under all the evidence it was important that the jury should be properly and accurately instructed. The court gave nine instructions as presented by defendant, and counsel for plaintiff contends that in the giving of two of them the court committed error. Instruction No. 1, offered by defendant and given, is as follows:

> "The court instructs the jury that as a proposition of law 'the parents in whose custody the child was must be charged with the duty of exercising reasonable care for its safety, and, if for want of such care the child was killed, it is apprehended there can be no recovery on behalf of the next of kin,' and if you believe from the evidence that the parents did not exercise that degree of care, then you should find the defendant, City of Chicago, not guilty."

The instruction, as we view it under the facts in evidence, is misleading and erroneous. The question as to whether the parents of the boy, at and before the time of the accident, were exercising due care for his safety was not made an issue during the hearing of the testimony. The evidence is undisputed that neither parent was present when the accident happened and had not seen him for the previous half hour, and that both had warned him frequently not to climb the pole. The main defense at the trial was that the boy was guilty of such contributory negligence as barred a recovery by plaintiff. It is well settled that instructions should not be predicated upon propositions not in issue. Furthermore, the instruction, which directs a verdict, is lacking in the essential element that the failure of the parents (if any there was)

to exercise reasonable care for the boy's safety contributed to the injury. (Pearson v. Morton, 226 Ill. App. 415, 425.) It is equally well settled that the giving of an instruction, which directs a verdict and which does not contain all of the essential elements justifying such verdict, is erroneous and cannot be cured by other instructions.

Instruction No. 8, offered by defendant and given, is as follows:

> "The jury are instructed that the defendant, City of Chicago, is not an insurer against the dangers incident to and resulting from the handling of electricity in its use in the public streets. But that the defendant, City of Chicago, is bound only to exercise reasonable care to keep its electric lighting systems and the means of distribution thereof in a reasonable safe condition. The jury are further instructed if you believe from the evidence that the defendant, City of Chicago, exercised reasonable care to keep its electric lighting system and the means of distribution thereof in a reasonable safe condition, then you should find the defendant, City of Chicago, not guilty."

We think that this instruction, under the issues and the facts in evidence, tended to mislead the jury on the question of the degree of care required by defendant. In Commonwealth Electric Co. v. Melville, 210 Ill. 70, 78, it is said: "Electricity is a subtle and powerful agent. * * As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention for the purpose of avoiding injury to another, to constitute what the law terms 'ordinary care.' The care must be commensurate with the danger." In Stodwell v. City of Chicago, 297 Ill. 486, 489, it is said: "The City of Chicago was therefore bound to know the dangers incident to lighting its streets with electricity and to guard against accidents by the exercise of a degree of care commensurate with the danger." In an exhaustive annotation, under the heading 'Duty to guard against danger to children by electric wires,' 17 A. L. R. p. 833, the Annotator says: "In view of the deadly character of high-tension wires, * * the courts generally have required a very high degree of care in the placing and main-

tenance of such wires, in favor of the general public. And in view of the curiosity of children, their ignorance, and heedlessness of danger, and known love of adventure, the courts have imposed an added duty upon persons maintaining deadly wire. to guard them so that they will not cause injury to children." Neither in the instruction complained of nor in any other instruction was the jury enlightened as to what would be reasonable care on defendant's part under the peculiar facts and circumstances in evidence. We think that the giving of it was prejudicial to plaintiff. Because of the giving of these instructions the judgment of the Superior Court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Fitch, J., concur.

4703

239 I.A. 646

318 - 30171

STANLEY SKALCZYNSKI, for use of WILLIAM JUNKER CO., a corporation,
Appellant,

vs.

JOSEPH CZAJCZYNSKI,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago, discharging the garnishee (who answered orally "no funds") in an attachment proceeding commenced by William Junker Co. on October 3, 1924. The attachment was sustained and judgment for $857.33 was entered against the original defendant, Skalczynski.

The case, as against the garnishee, Czajczynski, was heard on an agreed state of facts, substantially as follows: On February 11, 1924, Skalczynski was in the bakery business at 1446 Emma street, Chicago, and on that day he executed a chattel mortgage, conveying certain specifically described personal property contained in his store and bakery shop to Czajczynski, as security for the payment of $2500, as evidenced by his four chattel mortgage notes, payable respectively in three, six, nine and twelve months after the date of the mortgage, which was duly recorded on February 16, 1924, but which was defectively acknowledged. Subsequent to its execution and recording, Skalczynski became indebted to William Junker Co. in the sum of $857.33, and on September 18, 1924, (Skalczynski having defaulted in the payment of some of said notes and as regards other conditions) Czajczynski took possession under and by virtue of the

mortgage of the property covered by it. The attachment suit was not commenced by William Junker Co. until more than two weeks after Czajczynski had taken actual possession of the property.

The bill of exceptions discloses that, on the hearing of the case against the garnishee on the above agreed facts, William Junker Co. contended that, inasmuch as the chattel mortgage was defectively acknowledged, the taking possession by Czajczynski of the property under the mortgage constituted a violation of the Bulk Sales Law of Illinois; and that the court held that, considering the acknowledgment to be defective, the taking possession by the mortgagee of the property, before he was served as garnishee and before any attachment levied, cured the defect, if any, and that such taking did not constitute a violation of said Bulk Sales Law.

We are of the opinion that both of the court's holdings were correct and that no error was committed in discharging the garnishee. As to the first holding it is well settled that, if a mortgagee takes possession of mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, even though the mortgage is not acknowledged and recorded or the record thereof be irregular. (First National Bank v. Horse Commission Co., 198 Ill. 232; Springer v. Lipsis, 209 Ill. 261.) In Frank v. Miner, 50 Ill. 444, it is decided that, although the possession of personal property by the mortgagor may be fraudulent as against creditors and purchasers, by reason of the mortgage not having been properly acknowledged, still if the mortgagee actually obtains possession under a clause in the mortgage permitting him to do so before any other rights attach as respects the property, he will hold the same position he would if the possession had passed to him at the time the mortgage was given.

As to the court's second holding this division of this

appellate court has held that the Bulk Sales Law, being in derogation of the common law, should be strictly construed as to its application (Superior Plating Works v. Art Metal Crafts Co., 218 Ill. App. 148, 151.) And the appellate court for the second district, following what it considers the weight of authority in other jurisdictions, has held that "a chattel mortgage does not come within the provisions of the Bulk Sales Act." (Talty v. Schoenholz, 224 Ill. App. 158, 163.) And the U. S. Circuit Court of Appeals, for the seventh circuit, in a comparatively recent case, in construing the Illinois Bulk Sales Act of 1913, in connection with the Illinois Chattel Mortgage Act, as amended in 1915, has reached the same conclusion. (In re George Eaton Thompson Co., 297 Fed. Rep. 934, 937.)

We think these adjudications are decisive of the points raised on the present appeal, and accordingly the judgment of the Municipal Court discharging said garnishee will be affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

337 - 30190

COLUMBIA PHONOGRAPH CABINET COMPANY, a corporation,
Appellant,

vs.

ENTERPRISE SALES COMPANY, a corporation,
Appellee.

291 I.A. 646

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On the second trial without a jury before the Honorable Arnold Heap, one of the judges of the Municipal Court of Chicago, and after defendant by leave of court had filed an amended statement of claim of set off, the court found the issues against plaintiff on the set off, assessed defendant's damages at $995.95, and on December 19, 1924, entered judgment against plaintiff for that amount. Plaintiff, on being allowed an appeal, was given 60 days within which to file a bill of exceptions, which time expired on February 17, 1925.

After plaintiff had filed the transcript of the record in this appellate court, defendant moved to strike the bill of exceptions, and, on June 16, 1925, the motion was reserved to the hearing.

It does not appear that within the 60 days' time allowed for the filing of the bill of exceptions any order was entered in the Municipal Court extending that time, but it does appear that on the sixtieth day the bill was presented to the Honorable William E. Viner, another of the judges of the Municipal Court but not the judge who tried the cause, and was marked and signed by him as being "presented;" and that nothing further was done as to said bill until April 25, 1925, when the trial judge, Judge Heap,

entered an order that "the bill of exceptions herein presented be and it is hereby approved and ordered filed this date nunc pro tunc as of February 17, 1925," and said bill was then filed with the clerk.

There is no showing in the transcript that due diligence was exercised to present the bill to the trial judge within the time required, or that during the time he was under any of the disabilities mentioned in the statute (Section 81 Practice Act), or any recitation by him disclosing why the bill was not presented to him within the required time. Under such circumstances, the motion to strike must be allowed. (Schwartz v. Brink's Express Co., 198 Ill. App. 381; Kassal v. Wolfson, 215 Ill. App. 1; People v. Rosenwald, 266 Ill. 548.) And as none of the errors assigned and argued are based upon the common law record, the judgment must be affirmed. (Kassal v. Wolfson, supra.) We have examined, however, the purported bill of exceptions and the alleged grounds for reversal based thereon, as well as the opinion (not published in full) of another division of this appellate court on a former appeal (232 Ill. App. 620), and are of the opinion that counsel's points are lacking in substantial merit.

For the reasons indicated the bill of exceptions is stricken from the record and the judgment of the municipal court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

349 - 30202

H 7052

239 I.A. 646

M. B. OKUN,
Appellant,

vs.

HARRY RANDALL and
ABE RANDALL,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract tried in the Municipal court without a jury the court, at the conclusion of plaintiff's evidence and on defendants' motion to find the issues in their favor (which motion was in effect a demurrer to plaintiff's evidence) made such finding, and entered judgment against plaintiff for costs and he appealed.

The action was for the recovery of $300, based upon the following written agreement, dated November 16, 1923:

"M. B. Okun
Real Estate & Investments
106 N. LaSalle Street
Chicago,

Nov. 16, 1923.
We hereby agree to pay to Rubin and Okun Three Hundred Dollars for securing first mortgage at thirty thousand dollars on garage located at 3609-21 Harrison Street, subject to approval of Randall Bros., also if placed white (with) Engers at 30 N. Dearborn St.; this agreement is good up to Nov. 23, 1923.
(Signed) Randall Bros.
By Harry Randall."

In his amended statement of claim plaintiff set forth in haec verba the agreement, and alleged in substance that prior to its execution defendants had been negotiating with one Frank W. Engers (mentioned in the agreement) for the obtaining of said loan, which negotiations had not been consummated; that pursuant to the agreement plaintiff and Rubin proceeded to negotiate with Engers for said loan and finally secured it for defendants, and

within the time and according to the terms specified; that afterwards and prior to the commencement of the suit said Rubin sold and assigned to plaintiff all his right and interest in and to said agreement and the benefits thereof; and that by reason of the foregoing defendants became obligated to pay to plaintiff the said sum of $300, but that they had failed to make such payment, although often requested.

In defendants' affidavit of merits they denied that plaintiff had negotiated or secured said loan prior to November 23, 1923, or had secured at any time any loan for them, or that they were indebted to plaintiff in any sum.

On the trial plaintiff introduced in evidence, without objection, the agreement and a certified copy of a trust deed, signed and acknowledged by Abe Randall, bachelor, securing a loan of $30,000 on said garage property and running to said Rogers, as trustee. While the deed is dated October 26, 1923, the certificate of the notary public discloses that it was not acknowledged by said Randall until November 21, 1923, five days after the making of said agreement. The certificate of the recorder shows that it was filed for record on November 27, 1923. Plaintiff then called said Rogers as his witness, who proved to be hostile to him. Rogers testified in substance that he was in the real estate loan business; that he did not make the loan in question but "bought" it from one Rothschild; that he "accepted" the loan some time in November, 1923; that the reason the trust deed, although dated October 26th, was not acknowledged by Abe Randall until November 21st, was because of "some arrangements between Mr. Rothschild and Mr. Randall, and they did not come to sign the papers;" that plaintiff called on him (Rogers) at his office in November regarding said loan and he told plaintiff that the loan had been "placed" some time before; that he then took plaintiff

over to see Rothschild, as he "wanted them to meet and also wanted Rothschild to know another application was being made for this very same loan;" that Rothschild, having had negotiations with Randall, then told plaintiff that "the loan was placed, papers signed and he was ready to pay out the money," and thereupon plaintiff went away and he (Engers) never saw him again; and that he (Engers) had "purchased" said loan from Rothschild "more than two weeks" before plaintiff first came to his office.

Plaintiff then took the stand as a witness in his own behalf and testified that he was in the real estate business; that said Rubin was formerly a partner of his in that business; that Rubin has sold and assigned to him all interest in said agreement; that on the day the agreement was signed both of the defendants called at his office, made certain explanations and requested him to endeavor to consummate the said loan on their garage property; that one of the defendants then signed a written order on a card directing a third party to deliver to plaintiff the plans of said garage, which plans plaintiff procured and shortly thereafter called on Engers with the plans and had certain conversations and negotiations with him. He was asked to state these conversations and negotiations, but, on objection being made, he was not allowed by the court to do so. On his cross examination it was brought out that he had negotiations with Engers, that Engers said that "as far as he was concerned he would make the loan" but that he wanted plaintiff to see Rothschild, that in company with Engers plaintiff called on Rothschild and that during the conversation Rothschild said that he would telephone the Randalls.

We are of the opinion that the trial court erred in granting defendants' motion, made at the close of plaintiff's evidence and in entering a judgment in defendants' favor. As we read the present transcript there was some evidence tending to

prove plaintiff's case as stated in his statement of claim. In Helm v. Commercial Men's Ass'n, 279 Ill.570, 575, it is said: "In a trial before the court without a jury a legal question, only, is raised by demurring to the evidence. The same question may be raised by submitting a proposition to the court or by a motion to find for the party. * * If the court sustains the motion, judgment necessarily follows in favor of the party making the motion * * . If there is no evidence, or but a scintilla of evidence, tending to prove the material ultimate facts necessary to sustain the plaintiff's cause of action, such a motion by the defendant should be sustained; but if there is in the record any evidence, although contradicted, which the court can reasonably say fairly tends to prove all the ultimate facts necessary to entitle the plaintiff to judgment, then the court should overrule the motion, unless there is also uncontradicted evidence in the record that establishes an affirmative defense for the defendant. (Libby, McNeill & Libby v. Cook, 222 Ill. 206.)"

And we think that the trial court erred, in view of the written agreement between the parties and other facts and circumstances in evidence, in refusing to allow plaintiff to testify to the conversations and negotiations he had with Angers shortly after the execution of the agreement and before the trust deed securing the loan was acknowledged by Abe Randall, which deed was afterwards recorded. Such conversations and negotiations were clearly within the line of plaintiff's employment, as evidenced by said agreement, and, if plaintiff had been allowed to relate them, might have shown that the loan was finally secured through plaintiff's efforts. (Hill v. Carson, 177 Ill. App. 314; Steele v. Lippman, 115 N. Y. Supp. 1099.)

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Fitch, J., concur.

355 - 30208

4706a

BRADFORD-KENNEDY CO.,
a Corporation,
Appellant,

vs.

MORRIS GILLMAN, trading as
Gillman Lumber & Cabinet Co.,
Appellee.

239 I.A. 346

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, tried without a jury, the court found the issues on plaintiff's statement of claim and defendant's set-off against plaintiff and assessed defendant's damages at $522.96. Judgment was entered on the finding and plaintiff appealed.

In March, 1923, plaintiff was in the lumber business at Omaha, Nebraska, and defendant in the same business at Chicago. One E. W. Kauffman was a lumber salesman and agent at Chicago for various lumber concerns, including plaintiff. About March 22, 1923, Kauffman telephoned defendant, soliciting him to buy from plaintiff one car of No. 5 white pine boards, at $26 per 1,000 feet. He stated that the car was a small car, containing only 26,000 feet, and was then in transit from Omaha, having been rejected in transit by one Damon Box Co. of Chicago, to whom it had been consigned. Defendant finally agreed to purchase the car and told Kauffman over the telephone to "let it come in." Kauffman immediately wired and wrote plaintiff of the details of the sale. Instead of re-consigning or diverting the car to defendant, plaintiff shipped from Omaha to defendant at Chicago a different car of No. 5 white pine boards, containing 34,681 feet, at said price, f. o. b. Chicago, and about the same time mailed an invoice and bill to defendant, showing $901.71 to be the total price, less



a credit to defendant on a prior transaction at $75 or a net claimed indebtedness of $826.71. It was to recover this net sum from defendant that plaintiff instituted the present action.

In defendant's affidavit of merits it was alleged as a defense that the lumber, as contracted for, was not delivered, but that other lumber of an inferior grade was delivered, which defendant refused to accept and so immediately notified plaintiff's agent, Kauffman; that the latter requested defendant to store it in his yard until plaintiff could remove the same; that defendant complied with the request, paid the freight from Omaha to Chicago on the car, amounting to $453.60, and expended $60.38 for labor in unloading the car; and that plaintiff has failed to remove the lumber, which is still in defendant's yard subject to plaintiff's order. Defendant also filed a set-off claiming an indebtedness from plaintiff for said sums paid for freight and for unloading, and also for the further sum of $156.06 for "rent space" for the lumber. The court disallowed plaintiff's claim, but allowed defendant's claim of set-off only for the sums expended for freight and the unloading.

On the trial plaintiff's only witness was W. Boyd Smith, its general manager at Omaha, who testified by deposition to the effect that the lumber in question was originally shipped to plaintiff at Omaha from a mill in March, 1923; that upon the arrival of the car in plaintiff's yard at Omaha it was "unloaded in part" and about April 6, 1923, was "re-loaded" and shipped to defendant at Chicago, where it arrived about April 15, 1923; and that, if defendant paid the freight from Omaha to Chicago, he would be entitled to an additional credit therefor on plaintiff's claim. Plaintiff also introduced in evidence certain letters and telegrams. Defendant, in addition to introducing certain letters, telegrams, and other writings as exhibits, testified in his own

behalf and Kauffman was also a witness for him. From their testimony and certain exhibits the following facts appear in substance: When defendant received plaintiff's said invoice, showing the shipment of the car in question, containing 34,681 feet of boards, he immediately notified Kauffman that he could not accept such an invoice, as the car was not the small car he had agreed to buy. Kauffman said he would write for a tally and did so, but plaintiff replied by letter that it could not then forward a tally. The car in question reached defendant's yard in Chicago about April 17th, and some of defendant's men started to unload it, and the lumber was inspected. As a result of this inspection defendant immediately stopped the unloading and telephoned Kauffman that he could not accept the lumber, as it was not of the grade or quantity as represented. Kauffman immediately came to the yard and, after viewing the car and the lumber, said that the car was not the "Damon" car as ordered, that the lumber was of a different and a poorer grade, and was not the lumber which he had sold to defendant. Upon defendant saying that he could not make any use of the lumber, even at a reduced price, and that he would not accept it, Kauffman requested that, nevertheless, defendant pay the freight due to the carrier, unload the car and store the lumber in defendant's yard, and that he (Kauffman) would immediately communicate with plaintiff and some future disposition of the lumber would be made. After making objections to the request defendant finally agreed to pay the freight, amounting to $453.60, and did so, and unloaded the car at an expense of $69.36, and stacked the lumber in his yard, subject to plaintiff's order. Afterwards various communications were had between defendant and Kauffman as to the removal of the lumber, which was not removed, and in July, 1923, defendant began communicating direct with plaintiff at Omaha, with the result that plaintiff took the

position that defendant had by his acts accepted the lumber and was liable to plaintiff for the invoice price less proper credits. Defendant continued to maintain his original position, viz, that the lumber shipped to him was not the lumber which he had ordered, was of a poorer grade and useless in his business, and that he had never accepted it. Plaintiff made no attempts to sell the lumber to other parties, continued from time to time to mail bills for the lumber to defendant, and, after paying certain commissions to Kauffman on account of the claimed sale of the lumber, finally commenced the present action on September 9, 1924. The lumber still remained in defendant's yard at the time of the trial.

Counsel for plaintiff contend that the finding and judgment of the trial court are contrary to the evidence and to the law, and they ask that judgment be entered in this appellate court against defendant for $373.11, being the amount of plaintiff's net claim $826.71, less said freight paid by defendant, $453.60. Counsel argue in support of their contention (a) that there was a sale and delivery of the lumber in question to defendant and an acceptance of it by him; (b) that Kauffman, as plaintiff's agent, had no authority other than to procure a purchaser for the lumber at the invoice price; and (c) that there was an account stated between the parties. After a careful review of the evidence we think that the trial court was fully justified in its finding and judgment. It appears that defendant did not purchase the particular car of lumber which plaintiff delivered to him, that the lumber delivered was considerably larger in amount, and of a different and poorer grade, than the lumber ordered, and was useless to defendant in his business, and that defendant never, either expressly or impliedly, accepted the lumber. Immediately upon receipt and examination of the lumber defendant notified plaintiff's agent, Kauffman, that he could not and would not accept it, giving his reasons therefor, and plaintiff was shortly

thereafter notified by said agent of defendant's position. Defendant did not appropriate the lumber to his own use, and under the facts and circumstances shown did no act which was inconsistent with his position originally taken. At the earnest solicitation of plaintiff's agent, and more as a favor to plaintiff (with whom he had had prior dealings) than otherwise, he consented to pay the accrued freight bill and to allow the rejected lumber to remain in his yard until plaintiff, through said agent, could sell it to other parties in Chicago and remove it from said yard. And we think that the testimony of Kauffman, supplemented by certain letters passing between plaintiff and him, sufficiently discloses that Kauffman had authority on plaintiff's behalf to make the agreement which he did make with defendant after the latter had refused to accept the lumber. And in our opinion the evidence is wholly insufficient to sustain plaintiff's contention that it can recover for the lumber on the theory of an account stated.

For the reasons indicated the judgment of the Municipal court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

4702

358 - 30211

GARDEN CITY PAINT & VARNISH CO., a corporation,
Appellee,

vs.

TEOFIL WILCZEWSKI,
Appellant.

239 I.A. 64

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action ex contractu the Superior Court, after both parties had introduced evidence, orally instructed the jury to find the issues for plaintiff and assess its damages at $744.21, which included interest on its claim. The jury returned such a verdict and on September 24, 1924, judgment was entered against defendant for said sum and he appealed.

Plaintiff's declaration, filed on the day the action was commenced, August 14, 1923, consisted of a common count alleging an indebtedness of $665.21, on July 31, 1923, for goods and merchandise sold and delivered to defendant at his request. Accompanying the declaration was an affidavit of claim, alleging that there was due from defendant $665.21, after allowing all just credits and set-offs. Plaintiff also, after subsequent rule, filed a bill of particulars, showing that the goods were "paints and oils" and sold and delivered to defendant in several invoices on April 17th and 19th, 1922. To the declaration defendant filed a plea of the general issue, together with an affidavit of merits in which he stated that he "verily believes he has a good defense to this suit, upon the merits, to a part of plaintiff's demand, which part amounts to $635." He did not in the affidavit specify the nature of such defense, as required by section 55 of the Practice Act. He, however, filed at the same time (evidently

under the provisions of sections 46 and 47 of the Practice Act) a notice in writing of the special matters intended to be relied on for a defense on the trial, viz. (1) that plaintiff is indebted to defendant in the sum of $515.21 for the price of certain goods sold and delivered by it to defendant, which said goods "were not of merchantable quality and were unfit for the use to which the same were to be put" by defendant, and (2) that plaintiff is indebted to defendant in the further sum of $120, "for loss and damage occasioned this defendant by the use of certain of the material for which the plaintiff brings suit, and which was sold and delivered to this defendant as flat paint, whereas in truth and in fact it was not flat paint, and defendant was compelled to and did remove the same off the decorations upon two apartments at a loss to him of $120; and that on the trial defendant will set off and allow to plaintiff, against any demand on its part to be proved on such trial, so much of said sums of money so due from it to defendant as will be sufficient to satisfy and discharge such demand."

On the trial A. J. Nepil and Julia Vabrian, respectively general manager and bookkeeper for plaintiff, testified in its behalf, and their testimony together with certain duplicate invoices introduced in evidence showed that the paints and oils in question were delivered to defendant on April 17th and 19th, 1922, and accepted by him, and portions thereof afterwards used by him in his business, and that no question was ever raised as to the prices as stated in the invoices. Nepil testified in substance that the agreement made at the time of the sale was that defendant was to pay $300 on the receipt of the goods and the balance in 30 days; that about a month after the deliveries of the goods, although up to that time he had not made any payment, defendant called and sought to purchase further goods, but that the witness told him that before he could get further goods he should pay

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something on account for the goods already delivered; and that at the time of this conversation defendant did not make any complaints that the said goods were not of merchantable quality, or were not as represented, but only stated that at the time he did not have money to pay for them. Defendant, a painter by trade for 25 years, testified in his own behalf, and an employee of his, named Hakrant, testified for him. We have read their testimony, and, in our opinion, the same does not tend to prove any of the special matters of defense as set forth in defendant's notice of defense above mentioned. Defendant testified in substance that shortly before plaintiff commenced the present suit he had another conversation with Nepil, in which he complained that some of the paint in question was "no good" and was not "flat" paint as distinguished from "glossy" paint, and demanded that plaintiff take away from his place of business such of the goods in question as he (defendant) had not used or sold, as he was not going to pay for them, which demand was refused by Nepil. This demand was properly refused. There is no evidence tending to show that any of the paint in question was sold as "flat" paint, or that any "flat" paint was ordered by defendant. Defendant also testified that some of the packages of the goods in question did not have labels on them and some of the labels were so mutilated as to be illegible. These defects, if any, could have been readily discovered when the goods were first received by defendant, yet he did not complain of them for more than three months.

Considering the pleadings and the evidence, we are of the opinion that the court would have been fully justified in instructing the jury to return a verdict in plaintiff's favor for the amount of its claim, $665.21. In America Theatre Co. v. Siegel & Co., 221 Ill. 145, 147, it is said: "The law does not permit a person to receive goods under a contract, appropriate them to his own

of the Jabelm

use, and then defeat an action for the purchase price on the ground that the goods were not of the exact quality or description called for by the contract. His remedy, in the absence of a warranty, is to refuse to accept the goods when delivered, or to return them within a reasonable time after the departure from the terms of the contract is discovered." (See, also Eureka Cast Steel Co. v. Morden Frog Works, 23 Ill. App. 591, 594; M. Hommel Wine Co. v. Netter, 197 Ill. App. 382, 391; Uniform Sales Act, Sec. 48.) Yet the court in its peremptory instruction, given orally, directed the jury to assess plaintiff's damages at $744.21, which included interest of $79, as computed at the legal rate on the price of the goods sold from the date of delivery, April 17, 1922, to the date of the trial. We think that the court erred in allowing any interest on plaintiff's claim. Hepil testified that the goods were sold partly on time, and plaintiff's declaration charged that defendant became indebted to it on "July 31, 1922." And as the suit was begun on August 14, 1923, it cannot be successfully contended that there was "an unreasonable and vexatious delay of payment." (Interest Act, Sec. 2.) And "to appear and defend a suit is a right which cannot be construed into 'unreasonable and vexatious delay of payment,' without impairing the right itself." (Aldrich v. Dunham, 16 Ill. 403, 404; County of Franklin v. Layman, 145 Ill. 138, 150.) While the court should not have given the instruction orally to the jury (Practice Act, sec. 73), yet the error in so doing does not warrant the reversal of the judgment in its entirety and the remandment of the cause for a new trial. Daily v. Boudreau, 231 Ill. 228, 231.) And we are of the opinion that one of defendant's counsel's points, relied upon for a reversal of the judgment and based, as it is, upon the "Act to regulate the sale of paints and oils," etc. (Cahill's Stat. 1923, Chap. 38, p. 1228) is wholly without merit. It nowhere appears from the evi-

dence that plaintiff, either in the making of the contract or in its performance, violated any of the provisions of said Act. Furthermore, the point is raised for the first time in this appellate court.

Accordingly, if plaintiff within 10 days shall file in this court a remittitur of $79 from the judgment of the Superior court, the judgment will be affirmed for the sum of $565.31; otherwise it will be reversed and the cause remanded. In case the remittitur is filed each party shall pay his or its own costs in this court.

AFFIRMED ON REMITTITUR.

Barnes, P. J., and Fitch, J., concur.

364 - 30217

MAGNETIC MANUFACTURING CO., a Corporation,
Appellee,

vs.

HIRE BROTHERS, a Corporation,
Appellant.

239 I.A. 647

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, tried without a jury, to recover the purchase price of certain machinery sold and delivered to defendant on its written orders, the municipal court found the issues against it and assessed plaintiff's damages at the sum of $567.50, and entered judgment on the finding, and defendant appealed.

Plaintiff's place of business was in Milwaukee, Wisconsin, and it had a selling agent in Chicago, - the Williams-Beasley Co. Defendant's plant, in which the machinery was installed, was located in Chicago, and the orders for the machinery were given through Williams-Beasley Co. The machinery consisted of a magnetic separator with pulley, price $342.50, and a motor generator set, price $225, the payments to be made 30 days after delivery. The orders were dated November 9, 1921, and the machines were shipped on November 18, 1921, and shortly thereafter installed in defendant's plant. The total price was $567.50. On March 18, 1922, plaintiff, by agreement with defendant, shipped a second generator set, price $225, to take the place of the first, - it being expressly agreed that defendant was to have credit for the first upon its return to plaintiff at Milwaukee. The second generator set was installed in defendant's

239 I.A. 647

plant shortly thereafter and the first set was taken down and crated for shipment, but was not shipped back to plaintiff. On July 13, 1922, a fire occurred in defendant's plant and all three machines were damaged to such an extent that repairing them would cost more than their price new. Defendant, although often requested, never paid plaintiff anything on account of the machines, and on January 8, 1923, plaintiff instituted the present action, claiming in its statement of claim that defendant was indebted to it in the total sum of $792.50 for the sale and delivery of the three machines, and also upon an account stated. The court only allowed a recovery for the magnetic separator and one generator set. No cross errors have been assigned by plaintiff.

In its affidavit of merits defendant set up as defenses (1) that it did not purchase the machines outright, but that all were installed "on trial" that they would subserve the purpose for which they were desired, and that they did not subserve that purpose, and (2) that there was never a stated account between the parties.

On the trial W. A. Hine, president of the defendant, was called by plaintiff as a witness under section 53 of the Municipal Court Act, and during his examination the orders and invoices and certain letters were introduced in evidence. R. H. Stearns, general manager of plaintiff, and T. E. Beasley, of Williams-Beasley Co., testified in plaintiff's behalf, and W. A. Hine and two of defendant's employees, McKenna and McLaughlin, were called as witnesses in its behalf. Defendant also introduced two letters passing between Stearns and Beasley in May, 1922, relative to the working of the machines and shortly after a test of them had been conducted by Beasley in defendant's plant. Hine testified in substance that in his original negotiations with Beasley he told him that he wanted machines for the purpose of taking out iron and

other foreign material, capable of being magnetized, from garbage, which was treated in defendant's plant and afterward sold for fertilizing purposes; that Beasley said that the machines (which defendant afterwards ordered and used for over six months) would do the required work and "keep the iron entirely out;" that after using the machines it was found that they did not work satisfactorily; that they did not take out all of the iron, particularly the larger pieces, which caused trouble and damage, and for the reason that the pulley of the separator was too small; and that Beasley, after making several tests, said that defendant would have to procure machines of larger size and capacity. McLaughlin, defendant's witness, who was present when the tests were made, testified in substance that the material that went over the separator was animal matter and garbage, collected in large lots from hotels and restaurants; that the magnetic articles, and bottles, in the material constituted not more than one per cent. of the entire bulk; that when the test was made in May, 1922, defendant was keeping a large box or receptacle underneath the separator, in which everything "which the pulley would catch" would be dumped; and that there was a "great big pile" of iron, etc., in the box or upon the floor which the machine had caught; that usually when the separator was running the box "would fill up in a day" and "quite a bit of iron stuff" would be procured out of the material that was run over the separator; that sometimes the separator would not be running for a week and sometimes it would be running for a month when defendant was "doing some job;" that sometimes the separator would run "half an hour steady," when the motor generator would get hot and the machines had to be stopped to let the generator cool off; and that during all of the period that the machines were in the plant prior to the fire he estimated that they were running on the

average about one hour a day. Beasley, plaintiff's witness, described in detail the machines and their workings, and testified in substance that he was present in defendant's plant when they were installed and thereafter made several tests of the machines; that on some of these occasions he found that the metallic rings and the ring brushes, which were parts of the separator, were not being properly cared for, that they were dirty and the dirt prevented the pulley from being magnetized as it should be in normal operation, and that he notified defendant of these conditions; that he cleaned the rings and brushes and afterwards the separator worked well, removing a lot of magnetic material, including a "big piece;" that on the occasion of the test made in May, 1922, a large piece of iron, which was so shaped as to afford the least contact to the magnetized surface, was used and the separator failed to pick out said piece from the material then being run; that thereupon the witness told Hine that, if the fertilizing material as run by defendant contained such pieces of iron, defendant had better purchase machines of larger size and greater capacity, costing about $200 more; that defendant continued to use the machines which had been installed, and during the following month of June Hine told the witness that he had concluded to order a larger sized separator in place of the one then installed, but that such order was not given to plaintiff; and that on several prior occasions the witness had endeavored to sell to defendant such larger separator, but that Hine refused to buy it, saying that "the price was too high."

Stearns, plaintiff's witness, testified in substance that on July 27, 1922, after the fire, he called on Hine in Chicago and demanded payment of the indebtedness due; that Hine said he had not yet made any settlement with the insurance adjusters but expected to do so within a few days, and he made an appointment with

the witness for another meeting on the following Monday, at which time, as Hine said, he would arrange for a settlement of the account; that the witness kept the appointment but Hine did not, and afterwards defendant refused to pay the indebtedness; that the machines were not sold upon any express warranty; that the separator was of the size ordinarily purchased by those desiring to remove magnetic articles of ordinary size from material to be used for fertilizing purposes and worked well for that purpose; and that, if unusually large pieces of iron, etc., were contained in the material run, plaintiff's larger sized machine was capable of removing them. Hine further testified that the machines in question, damaged by the fire, were not listed in defendant's proofs of loss given to the insurance adjusters, and that defendant did not collect any moneys from the insurance companies on account of the damage done thereto.

Defendant's counsel here contends in substance that the judgment should be reversed (1) because the evidence discloses that the machines were not sold to defendant outright but only subject to trial as to their capability of doing the work desired by it and that upon such trial they were found incapable of doing such work, and (2) because, the machines being desired by defendant for a particular purpose known to plaintiff, there was an implied wrranty on plaintiff's part that the same were reasonably fit for that purpose, and the evidence shows that they were not. After a careful review of the evidence we are unable to agree with either contention. We think it clearly appears that there was an absolute and unconditional sale of the machines at the prices mentioned in defendant's written orders and confirmed in plaintiff's invoices, and that the ownership of the machines passed to defendant upon their delivery to defendant at its plant.

(Uniform Sales Act, secs. 18 and 19.) The separator was used in defendant's plant for a period of more than six months from the time of its installation until the fire in July, 1922. The motor-generator set, as originally installed, was replaced by agreement by a new set in March, 1922, and during said period one or the other set was used. During the entire period, although plaintiff frequently wrote letters and sent statements to defendant, demanding payment for the machines, defendant did not write to plaintiff suggesting that the "trial" of the machines was unsatisfactory, nor did it make any suggestion by letter of any breach of any warranty, express or implied, nor did it prior to the fire, as admitted in Kline's testimony, write plaintiff that it would not accept the machines, or that it held them subject to plaintiff's order, or anything to that effect. Defendant's continuous use of the separator and of the substituted generator set under the facts disclosed amounted to an acceptance of them. (Sec. 48 Uniform Sales Act). If it ever had any right to reject and return them to plaintiff that right was waived. (Connor v. Borland-Grannis Co., 294 Ill. 58, 62). Furthermore, the evidence discloses that the machines were reasonably fit for the purpose for which they were intended to be used by defendant, although it appears that the size and capacity of the separator was insufficient to remove, from the fertilizing material being run, unusually large pieces of iron, or pieces of uncommon shape. Defendant was given the opportunity of exchanging the installed separator for one of greater capacity, and which would remove such pieces, upon payment of the difference in price, but refused the offer, or delayed acceptance thereof, and continued to use the installed separator. Furthermore, even if it could be held that

the evidence shows that there was a breach by plaintiff of an implied warranty of the fitness of the machines, such breach was not pleaded by defendant, either originally or by amendment (Walter Cabinet Co. v. Russell, 330 Ill. 416, 420), and defendant did not introduce any evidence of damages occasioned thereby. (Gifford Food Co. v. Western Fuel Co., 309 Ill. App. 357, 365).

For the reasons indicated the judgment of the Municipal court should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

4707a

388 - 30251

PETER S. LAMBROS, doing business as THE GREEK STAR,
Appellee,

vs.

THOMAS A. HARRISON and EDWARD J. RIEDY, doing business as HARRISON & RIEDY,
Appellants.

239 I.A. 647

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action commenced on January 8, 1925, to recover a balance of $75, claimed to be due upon a written advertising contract, the court found the issues against defendants and entered judgment against them in said sum and they appealed.

On the trial plaintiff introduced in evidence the contract sued upon. It is dated November 21, 1923, and is signed by defendants and plaintiff, and by it defendants authorized plaintiff to publish in his paper, "The Greek Star," their three inch advertisement every week for twelve months, for which they agreed to pay him $100, payable $25 in February, May, August and November, 1924, and he agreed that he would translate defendants' advertisement into Greek and mail them copies of his paper without additional charge. It was further agreed that the contract could not be cancelled without his written consent. Plaintiff testified in substance that the contract was not cancelled during its term, that he complied with all of its conditions to be performed by him, that defendants' advertisement translated into Greek appeared in the paper each week for 52 weeks, and that $25 had been paid by defendants on account. On cross-examination defendants' attorney sought to prove by plaintiff certain conversations claimed to have

been had between the parties prior to the execution of the contract, tending to show that the agreement between them was different from that as finally executed in writing. The court refused to allow the witness to testify as to said conversations. The ruling was proper under the well known rule that parole evidence is inadmissible to vary the terms of a written contract. Defendants did not introduce any evidence or make any attempt to show any fraud in its execution.

Finding no error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

4716

111 - 29520

DOROTHY SPITALNIKSON,

Plaintiff in Error,

v.

JAMES C. DAVIS, Director General of Railroads, as agent,

Defendant in Error.

239 I.A. 647

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This action was brought by the plaintiff, Dorothy Spitalnikson, on November 22, 1919, to recover damages alleged to have been occasioned by injuries caused by being struck by a locomotive, operated by the defendant, as agent of the Illinois Central Railroad Company. Issue was duly joined by the filing of a plea of the general issue and a special plea, by the defendant in January, 1920. The record shows that on June 26, 1920, the plaintiff personally executed a stipulation in writing, with counsel for the defendant, agreeing that her case be dismissed, the stipulation reciting, "the cause of action therein having been duly discharged." Together with the foregoing stipulation, the plaintiff executed an affidavit reciting "that she executed the above stipulation voluntarily, for the purpose of having said case dismissed." The record shows further that on the day the plaintiff entered into this stipulation with counsel for the defendant, she also executed a release of her claim, in consideration of a payment of $1250.00, which was made to her by the defendant in the form of a draft, which she later endorsed and cashed.

This transaction took place at the office of the defendant Company, and the record shows that at the time the plaintiff executed the release and stipulation she was accompanied by her husband. It is further shown that on this same occasion her husband was also paid $1250.00 by the defendant, in consideration for a release which he executed in settlement of any claim he might have against the defendant.

It appears from the record that following the execution of these releases and stipulation, counsel for the plaintiff filed additional counts to her declaration and certain amendments and took various other preliminary steps in connection with the case. In December, 1922, counsel for the defendant made a motion to dismiss the suit for reasons which did not involve the plaintiff's release and stipulation and so far as the record shows no reference was made to any such release and stipulation at that time. That motion of the defendant was overruled and the case was set for trial June 12, 1923.

The next step which was taken in this case was on June 23, 1923, when counsel for the defendant served notice on counsel for the plaintiff to the effect that on June 26, counsel for the defendant would appear in the Circuit Court and present the plaintiff's written stipulation, entered into with the defendant, in which it was agreed that this suit be dismissed and ask that the court enter an order accordingly. On June 26, the stipulation in question was duly presented and filed in the Circuit Court, and the motion to dismiss was made. At the same time the plaintiff was given leave to file a petition and affidavits, and those documents were

filed by her.

The plaintiff set forth in the petition she filed that "on or about the 13th day of July, 1930, she was caused to sign certain papers by the employees of the defendant * * * which she now believes to be, by its terms a release of her cause of action, and also to sign stipulations for dismissal of said cause of action. This plaintiff further represents to this court that said alleged release and stipulations for the dismissal of said cause of action were obtained through misrepresentation and fraud as set forth in the affidavit here to attached and made a part of this petition. Your petitioner further asks that said cause of action be not dismissed, for the reasons set forth in the said affidavit hereto attached and that said cause be set down for trial at an early date." In her accompanying affidavit the plaintiff set forth in detail the injuries she alleged she had suffered when she was struck by the locomotive, and by reason of which she had brought this suit against the defendant. She then stated in her affidavit that on or about the date named in her petition, through the procurance of the agents of the defendant she was caused to go to their office, and upon reaching there she was informed that her attorney had made a mistake in bringing the suit against the United States Government and that the law was that the Government could not be sued and that she could not possibly recover in the law suit. The plaintiff further alleged in this affidavit that prior to going to the defendant's office she was told by an agent, apparently representing the defendant, that her attorney was "in with them" and that she could not expect that the attorney would fight her case and get any money for her, and she was further told

by the defendant's agents that even though she could recover in her suit against the defendant, she could not, under the law, get more than the amount of money they were then offering her. She further set forth in this affidavit that when she insisted that she ought to be paid more for her injuries, and that the sum which was being offered was inadequate, one of the defendant's agents, stating that he was a lawyer, said that he did not believe he could get any more money for her but that he would go out and "talk with the General of the Government"; and that he left the room and returned shortly saying that he had talked with the General of the Government and that it was impossible to secure any more money for the plaintiff,- that she would either have to take the money that was being offered her or she wouldn't receive anything and further, that they were skilled in the fighting of these cases and there wasn't any use of any lawyer trying to get ahead of them in these cases, - reminding her that she was now dealing with the United States Government and that she could absolutely rely upon what she was being told and that if the statements made were not true, any settlement she might make with them would not be binding upon her, "even though she signed releases releasing the defendant for (from) all liability for her said injuries." Continuing, plaintiff's affidavit read, "Deponent further says that previous to her signing what she now believes and is informed is an absolute release of her cause of action in the above entitled matter, said alleged release was read to her by one of the agents of the defendant and as she understood his reading and believed said writing to mean that in case the said twelve hundred and fifty ($1250) dollars was not the maximum amount that she could recover in a suit against the defendant, that said alleged release

would not be a release against the defendant, and that said amount would only be applied on whatever amount she might be able to recover in case said representations by the agent of the defendant made to the plantiff for the purpose of inducing her to sign the said paper were not true."

The plaintiff alleged further in her affidavit that her signature to the release "was obtained by a trick and by misreading and misconstruing said instrument and by false representations as to the character of said alleged writing." She further alleged that believing and relying upon the representations made by the defendant's agents, to the effect that the case was one against the Government and that the Government could not be sued; that the law prescribed the sum that they were offering her, - twelve hundred and fifty dollars, as the maximum amount that could be recovered, even though she should win her case; and that her attorney was in the employ of the defendant and in collusion with its agents; "and understanding and believing the said writing was not an absolute release of her right, claim or cause of action against the defendant," she accepted the sum of $1350.00 and executed and signed the paper, "which she now believes and is informed is a release to the defendant of her said claim"; that she since has learned that the representations of the defendant's agents were untrue and that she is informed and believes the fact to be that the nature of said writing is other than what was read to her and what was represented to her to be at the time she signed said paper; that said alleged settlement was obtained through fraud and for a sum

greatly insufficient to remunerate her for the injuries suffered and to be suffered. She also submitted, in support of her petition, an affidavit by her husband to the effect that he was present during the plaintiff's conversations with the defendant's agents and that the plaintiff's affidavit had been read to him and that the facts therein set forth were true; and also an affidavit by her attorney, Corinne L. Rice, to the effect that she was the attorney for the plaintiff and had been since the institution of her suit and that notice of attorney's lien had been served upon the defendant, and further, that she was not and never had been, in the employ of the defendant, and that she had not received any compensation for any services rendered in the case, "and that the pretended settlement had herein was had without her knowledge or consent; and that the sum of money paid to the plaintiff under the alleged settlement is not a fair compensation or fair remuneration to plaintiff for her injuries received."

It will be noted that the alleged settlement of this case and the execution of the releases and stipulation to dismiss all took place in June 1920. The affidavit of the plaintiff, which was submitted in support of the petition she filed in June, 1923, when the defendant made its motion to dismiss the suit, pursuant to the stipulation, was not executed by the plaintiff at the time she filed her petition seeking to avoid the dismissal of the suit, but was executed under date of July 13, 1921, two years before the motion to dismiss was actually made and one year after she had executed the release and entered into the stipulation to dismiss. The affidavit of her husband was likewise dated July 13, 1921, while the affidavit of the

lawyer, also submitted in support of her petition, is dated January 5, 1932, about a year and a half before the plaintiff filed her petition seeking to avoid the effect of the stipulation and release. It is clear from the record that at the time the plaintiff made her affidavit in support of her petition, she did not have before her either of the documents she had previously executed, namely, the stipulation and release. Copies of these papers were furnished to the plaintiff by the defendant at the direction of the court, after the plaintiff filed her petition, asking that the defendant's motion to dismiss be denied.

The defendant's motion to dismiss, pursuant to the stipulation, and the plaintiff's counter petition, came on for hearing before the trial court on June 30, 1933. After hearing the arguments of counsel for the respective parties, the trial court found that the matters and facts set forth in the plaintiff's petition and affidavits, filed in support thereof, "were not sufficient in a court of law to overcome the settlement of the said cause made between the plaintiff and the defendant," and that there was nothing in the petition and affidavits which could properly prevent the dismissal of the suit pursuant to the stipulation into which the parties had entered. The bill of exceptions shows that at the time the trial judge announced his conclusion to that effect, he stated that in order that the plaintiff might not be precluded from showing the facts fully, with reference to the settlement, and to allow the plaintiff an opportunity to correct the insufficiencies of her affidavits, if she was in a position to do that, under the facts, she and her husband would be permitted to take the witness stand and give

any testimony they desired, supplementing the affidavits they had made. This amounted to a ruling that if the plaintiff desired to submit anything further, in support of her petition, she was at liberty to do so, but in case she did, it was to be in the form of sworn testimony in open court, rather than in the form of further affidavits. At the same time the court stated that if no further showing was made, the petition of the plaintiff would be denied and the suit would be dismissed in accordance with the stipulation, the court being of the opinion that the plaintiff's affidavits failed to show fraud going to the execution of the release and settlement of the case, but rather that the plaintiff knew that the document she was signing was a release and that such charges of fraud as might be considered as involved in such facts as the plaintiff had set forth in her affidavit, went to the consideration for the release, rather than to its execution. The bill of exceptions shows further that when the trial judge had stated his position in the matter, counsel for the plaintiff asked that the cause go over a few days so as to give them time to "think this matter over", and accordingly, the court put the matter over for one week, so that the plaintiff's counsel might determine whether she desired to stand upon her petition with the affidavits filed therewith, or to submit something further in the way of sworn testimony in open court. The court directed the plaintiff and her husband to return to the court room on July 7, 1923, the date to which the matter was continued, and the court also, at the request of the attorney for the plaintiff, directed the attorney for the defendant to furnish the former with copies of the release and the stipulation, and

the draft signed by the plaintiff; and also of the release signed by the plaintiff's husband and of the draft issued to him. When the matter again came up before the trial court, on July 7, 1923, counsel for the plaintiff stated that they had received copies of the documents above referred to, and asked the court for leave to file an additional affidavit of the plaintiff in support of her petition, whereupon the trial judge called the attention of counsel for the plaintiff to the fact that at the prior hearing the court had announced that in his opinion the affidavits already on file were insufficient and that if the plaintiff desired to submit anything further it must be in the form of oral testimony made in open court under oath, with an opportunity to cross-examine, and that the matter had gone over at counsel's request so that they might determine whether the plaintiff would stand on her original petition and affidavits or submit anything further by way of an oral examination of herself and her husband, or others; and the court then said that no additional matter, in the way of affidavits would be received. The court then stated that theplaintiff might submit anything further in the form that had been indicated. Nothing further was offered in support of the plaintiff's petition, along the lines suggested by the court, her counsel insisting on her right to file an additional affidavit, which was offered, and thereupon the court denied the plaintiff's motion for leave to submit such additional affidavit, and again offered to receive anything further that the plaintiff cared to submit in the way of sworn testimony. Nothing further was submitted by the plaintiff in accordance with the court's ruling. In fact, the bill of

exceptions shows that the plaintiff and her husband were not in court on July 7, 1923, in order to enable them to submit further testimony in that form.

On July 7, 1923, the court permitted Corinne L. Rice, attorney for the plaintiff, to file a petition setting forth that in November, 1918, when this suit was started, she served the defendant with notice of her contract with the plaintiff for attorney's fees. This petition stated that if the case was dismissed according to the stipulation entered into between the parties, the petitioner, "feels that it would deprive her of the right to receive said attorney's fees as provided in said notice;" wherefore the petitioner prayed that the case be not dismissed. The matter then went to July 14, 1923, at which time the court announced that the petition of plaintiff's counsel, referring to fees could not be entertained as it was not a petition to foreclose a lien for such fees, and that a petition of the kind could be filed by plaintiff's attorney, even after the order of dismissal had been entered; the court holding that such an order of dismissal would in no way effect the right of the plaintiff's attorney to such fee, and enforcement of a lien for such fee. Again on the last mentioned day, counsel for the plaintiff asked leave to file an affidavit of the plaintiff and also of her husband, in support of her petition theretofore filed, but the court denied this motion and thereupon entered an order dismissing the cause, in accordance with the stipulation of the parties filed on June 26, 1923. From the judgment of dismissal the plaintiff prayed an appeal which was never perfected.

The bill of exceptions shows that after the court had entered judgment dismissing the case and after those connected with the case had left the court room, Mr. Ranes, one of the attorney's for the plaintiff, returned to the court room and advised the trial judge that the plaintiff desired to make a motion to vacate the judgment and the court stated that if he would give proper notice to counsel for the defendant the court would act in the matter without delay, and thereupon, such notice was given to counsel for the defendant and later, on the same day the parties again appeared before the same judge, Mr. Ranes appearing for the plaintiff and thereupon he stated that the plaintiff did not care to make a motion to vacate the judgment.

The bill of exceptions further shows that on the same day counsel for the plaintiff appeared before another judge of the Circuit Court of Cook County and submitted their motion in behalf of the plaintiff, to vacate the judgment, which motion was continued to July 18, 1923, and again continued from time to time until December 21, 1923, when it came up before another judge of the Circuit Court, who took the position that it should be heard by the judge who had originally acted upon the plaintiff's petition and the defendant's motion to dismiss, and had entered the judgment which it was sought to vacate. To that end the matter was again set for January 12, 1924, to be heard by the original trial judge. On that date, the motion to vacate the judgment was denied. At this time the trial judge again stated that when he held that the original affidavits submitted by the plaintiff in

support of her petition were not sufficient, and counsel asked leave to file additional affidavits, the court ruled that such additional affidavits might not be filed but that the court would allow counsel to place the plaintiff on the stand to testify as to the facts occurring at the time the release and stipulation of dismissal were executed. At this time the court said, the reason the court did that was, that when the plaintiff made the affidavit and told all the facts, and then came in and sought to file additional affidavits which would set up additional facts, "I felt as if they should go on the stand so that they could be cross-examined; and I will say this also that if the plaintiff would take the stand and testify to the facts, and cross-examination should be allowed, the court would see that no abusive cross-examination would take place." Counsel for the plaintiff took the position that the court was wrong in ruling that any further showing submitted, should be in the form of oral testimony, rather than affidavits, "because that would be going into the merits of the case, which we claim we are willing to do before a jury. We are entitled to a jury trial and we are not going to try this case without a jury when we are entitled to one."

It was clearly within the discretion of the court, after the plaintiff had submitted her petition in opposition to the motion of the defendant to dismiss, pursuant to the stipulation, and after it had been held that such petition and the affidavits in support of it, were insufficient, to require that such further showing as the plaintiff cared to make in support of her petition be in form of sworn testi-

mony in open court, with opportunity to cross-examine, rather than in the form of affidavits. Such a course was entirely proper and is clearly within the provisions of Sec. 86 of the Practice Act, (Cahill's Ill. Sts. ch. 110, par. 86) providing that "whenever in any suit or proceeding at law or in equity in any court of record, evidence shall be necessary concerning any fact which, according to law and the practice of the court may now be supplied by affidavit, the court may, in its discretion, require such evidence to be presented wholly or in part, by oral examination of the witnesses in open court * * * and whenever such evidence is presented by oral examination, an adverse party shall have the right to cross-examine." The provisions of the statute are plain. That the situation presented in this case comes within those provisions is equally plain. When the plaintiff made the affidavit originally submitted by her in support of her petition, she knew all the facts that were to be known about what occurred at the time she received the $1350.00 and executed the release and entered into the stipulation to dismiss. After the trial court held that the showing made by that affidavit was insufficient, and that such fraud as it purported to disclose did not go to the execution of the release, but rather to its consideration; and the plaintiff thereupon sought to make some further showing, it was entirely within the discretion of the court to require, and in our opinion the trial court properly required, that such showing as the plaintiff cared to make should not be in the form of further affidavits, but rather in the form of sworn testimony in open court, with ample opportunity for proper cross-examination.

We have not been referred to any decisions specifically involving the statute referred to, nor have we been able to find any, but there are cases involving similar situations, where such an exercise of discretion as was made by the trial court in the case at bar, has been approved and upheld. Some of these decisions refer to the making of amendments to sworn pleadings and others to amendments to affidavits. Hoyt v. Tuxbury, 70 Ill. 342; Jones v. Kennicott, 83 Ill. 484; McNicham v. Pollette, 87 Ill. 103; Northwestern Aid Ass'n. v. Prism, 124 Ill. 100; Widener v. Hunt, 4 Iowa 355. Moreover, the additional showing required by the trial court, in support of the plaintiff's petition was not such a matter as the plaintiff had a right to have heard by a jury simply because the court, in the exercise of its discretion required that such showing be made in the form of sworn testimony, any more than the plaintiff would have had the right to have the matter submitted to a jury if the further showing had been in the form of affidavits. The question of whether such fraud had entered into the execution of the release and stipulation to dismiss, as rendered those documents, void, was a question of law for the court to hear and determine.

We are further of the opinion that the trial court properly ruled that the facts set forth by the plaintiff in her original affidavit, in support of her petition were not sufficient in a court of law to overcome the effect of the release and stipulation to dismiss. The defendant did not submit the release to the court in connection with its motion to dismiss, nor was it necessary that this be done. It was entirely proper for the defendant to submit the stipulation,

into which the plaintiff and the defendant had entered, in support of its motion. In opposition to that motion the plaintiff submitted her petition setting up in substance that when she signed the stipulation she had also signed another document, which she says in her petition was a release. In our opinion, counsel for the defendant is correct in contending that the petition and affidavit submitted by the plaintiff must be construed strictly against the party filing those documents. After they were filed the defendant contended in substance, that they were insufficient to defeat a motion to dismiss. Although the plaintiff had brought the release into the case, by reference thereto in her petition and affidavit, she, at no time, submitted the release to the court. Its contents are not set forth in either the petition or the affidavit nor was it submitted in the form of evidence. If the release was not under seal, it was incumbent upon the plaintiff to make a showing to that effect. No such showing was made, the plaintiff merely referring to the document she signed, as a release. As her petition and affidavit are to be taken most strictly against her, the release must be considered as one under seal. That being the case, the plaintiff was in a position to show only such fraud as might go to the execution of the document. In our opinion, such facts as the plaintiff sets up in her original affidavit, do not make out a case of that kind of fraud. The plaintiff's own statements, as set forth in her affidavit, show, in our opinion, that without any doubt she knew at the time she and her husband were at the office of the defendant Company, and received between them $2500.00, and executed these releases,

they were settling her case and were not in any way in ignorance of the fact that the documents signed were releases. The fact is that when the plaintiff signed her affidavit a year later, she stated that that was what she signed, although it was not until two years after that either she or her counsel asked for or received copies of these documents. Her affidavit shows that at the time she executed this release, she fully appreciated what it was because she says, herself, that she insisted at that time that she ought to be paid more for her injuries, and that the sum which was being offered was inadequate, but that she was told she would either have to take that or nothing. She then states that it was represented to her that the case being against the Government, the amount offered wasthe maximum that the Government could be compelled to pay, in any event. Even if we assume that anything of that kind occurred, and that such representations were fraudulent, they did not amount to fraud which tricked her into executing the release; but rather to fraud which entered into the consideration she received. If that did occur, the plaintiff might avail herself of it in a court of equity but she cannot avoid the effect of the release in a court of law. Chicago Street Rys. Co. v. Uhter, 213 Ill. 174; Panke v. Hammond, 193 Ill. 631; Monahan v. St. Paul Coal Co., 193 Ill. App. 308. The plaintiff could not properly support her petition by a showing such as she attempts to make in one portion of her affidavit, to the effect that she misunderstood the purport of the document she signed. In order to succeed in her position and avoid the effect of the release, in a court of law, it was necess-

ary for her to show that the defendant had practiced such fraud upon her as had gone to the execution of the document and had tricked her into signing what was, in fact, a release, under the impression that she was not signing that kind of a document. In our opinion, none of the facts set forth by the plaintiff in her affidavit make such a showing. There are mingled with her statements of fact, at one or two points in her affidavit, certain conclusions on her part to that effect, but these may not take the place of facts. Fraud may never be successfully charged merely by stating that a thing was fraudulently done. One who complains of fraud must state in his pleading the specific acts or facts relied upon as establishing such fraud. Sterling Gas Co. v. Hisby, 134 Ill. 557; Roth v. Roth, 104 Ill. 35.

The trial court was also correct in stating, as pointed out above, that if counsel have any proper claim for fees, such claim is in no way affected by the dismissal of the plaintiff's case. A claim for fees by counsel for the plaintiff was adjudicated after the client's case had been dismissed in Standidge v. Chicago Rys. Co., 254 Ill. 524.

We find no error in the record and, therefore, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

135 - 29550

ROSE M. TAAFE, Executrix of the Estate of Matthew Taafe,

Appellant,

v.

GUS GREENEBAUM,

Appellee.

239 I.A. 647

APPEAL FROM CIRCUIT COURT COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, as executrix of the estate of her husband Matthew Taafe, brought this action against the defendant, Gus Greenebaum, seeking to recover damages resulting from the death of her husband, which was alleged to have been brought about by injuries received by him when he was struck by an automobile which the plaintiff alleged was the property of the defendant and at the time of the occurrence in question was being operated by one Mittlebuscher, who was then and there acting as the defendant's servant. The defendant filed general and special pleas denying ownership and control of the automobile. The case went to trial before a jury and at the close of the plaintiff's evidence, the trial court instructed the jury to find the defendant not guilty. Such a verdict was duly returned and judgment for the defendant was entered accordingly. To reverse that judgment the plaintiff has perfected this appeal.

The evidence in the record establishes without any question that the automobile in this case belonged to Greene-

baum. Evidence to that effect was admitted without objection. We are of the opinion that at least a prima facie case was made out by the plaintiff, to the effect that Mittlebuscher was Greenebaum's servant. The only evidence on that issue consisted of the testimony of Mittlebuscher himself. It appears from this testimony that one Johnson had remodeled an old barn and this was being used by him as a garage. The witness testified that Johnson took care of cars for the Ascher Brothers Amusement Company and that three men who were connected with that Company, the defendant and two others, also kept their automobiles in that garage. In an attempt to establish the relationship between Mittlebuscher and Greenebaum, counsel for the plaintiff asked Mittlebuscher many questions which were leading and many others which called for conclusions, all of which were properly objected to and the objections were properly sustained.

It appears from the evidence that on the day in question Mittlebuscher was driving the defendant's car from the garage in which it was kept to Greenebaum's house, and on the way over there, the accident involved in this case happened. When Mittlebuscher was first on the stand, he was asked how he came to take the car from the garage to Greenebaum's house, and he started to reply by saying, "I either drove the car to Mr. Greenebaum's house under the directions of Al. Johnson or a telephone call --." At this point in his answer he was interrupted, by a motion of counsel for the defendant to strike the answer out. The court did not rule on the motion but made the comment, "He says he doesn't remember." Counsel for the plaintiff then put another question. Most of the succeeding questions put to this

witness were objectionable for the reasons already referred to, but a few of them were not. For example, one of the questions put to this witness was, "How did you happen to drive the car of the defendant Greenebaum from the garage that day to the house of Greenebaum?" Objection to that question was sustained. In our opinion it should have been overruled. It is true that this question was the same question which had previously been asked and which the witness was in the process of answering, when he was interrupted by an objection which was not ruled upon. This was a proper question and the witness should have been allowed to answer it. Apparently, this witness was testifying near the close of an afternoon session of the court, and before the cross-examination was completed an adjournment was taken to the following morning. When the witness resumed the stand at that time, he testified that he wished to correct a statement he had made the previous afternoon as to his recollection of the conversation which caused him to take the defendant's car, on the day in question, from the garage to the defendant's house. Counsel for the plaintiff then asked whether the witness had had a conversation with the defendant on the day of the accident, and before the accident happened, and he answered that he had talked with the defendant on that day, both before and after the accident. He was then asked to state what conversation he had with the defendant on that day, prior to the accident and he answered, "He called over the telephone and asked whether his car was there. I said, 'Yes'. He says, 'Will you please drive over right away.' I said, 'I will.'" The motion of counsel for the defendant to strike

out that answer was denied. No grounds were specified by counsel in making the motion. It is contended now by counsel for the defendant that testimony as to an alleged conversation with another over the telephone, where such other person has called the witness up, is not admissible unless the witness so testifying to the conversation states that he recognized the speaker's voice and is able to state who the speaker was. If counsel wished to urge that point as to this testimony, it should have been specifically made at the time objection was made to the question and the motion to strike was submitted. That, however, was not done.

Oneof the questions involved in this case has to do with the agency of Mittlebuscher. When he was driving the defendant's car from the garage to the defendant's house, and in the course of that operation struck the deceased, was he acting as the servant of the defendant or was he not? That was a question of fact. Apparently on the theory that the plaintiff had failed to make out a prima facie case on that question, the court instructed the jury to find the defendant not guilty, at the close of the plaintiff's evidence. As previously stated, we are of the opinion that the plaintiff's evidence did make out a prima facie case on that issue.

The evidence submitted by the plaintiff was to the effect that this was not a public garage. Such evidence as was submitted on the question of Mittlebuscher's employment tends to show that he was not in the employment of Johnson.

Mittlebuscher testified that he had a room on the second floor of the building in which this garage was located; that he did certain mechanical work in the way of repairing automobiles in this garage. He was asked whether he received his pay from Johnson and he said he did not; that in many instances he made his own arrangement with the owners of the cars which were to be repaired and after he had done the work, he collected directly from the car owners. He was asked whether or not it wasn't the fact that Johnson paid him so much a week for doing odd jobs around the garage and he replied that such was not the fact. He further testified that some times when Johnson was crowded with work he would ask the witness to help him and that on one or two jobs that he could recall, when he had assisted Johnson, the latter paid him for those jobs. He further testified that on some occasions he had taken the other cars that were kept in the garage to the owners or called for them and returned them to the garage and that he had done this at Johnson's request and that he had done the same with regard to the defendant's car on other occasions.

Throughout the brief filed in this court counsel for the defendant indulge in the presumption that Mittlebuscher was the employee of Johnson. It is argued that "It is a matter of common knowledge, which the court will not overlook, that garage service ordinarily includes delivery of the car to the patron." There can, of course, be no presumption one way nor the other on this question and a court may not take judicial notice that what may be termed delivery service is or is not included in garage service.

A number of cases have been called to our attention. It would serve no useful purpose to analyze those cases here because they may all be distinguished from this case, on the facts; where the evidence in the cases cited shows that the garage involved was a public garage and the car involved was kept at that garage under a contract involving a monthly charge, a part of the consideration for which was delivery service, which was furnished by a regular garage employee. The evidence in this case, so far as it went, showed that the garage in question was not a public garage. It was a remodeled barn in which the man Johnson himself did some repair work, looked after the cars belonging to a certain company and also kept there the cars of three individuals who were connected with that company, one of whom was the defendant.

In several places in the course of the brief filed in this court by counsel for the defendant, reference is made to the inferences that may legitimately be drawn from the evidence submitted by the plaintiff and it is argued that these inferences are such as to justify the action of the trial court in directing a verdict. Counsel point out the fact that when Mittlebuscher was first on the stand he testified that he took the defendant's car from the garage and was driving to the defendant's house on the occasion in question, either under the direction of Johnson or a telephone call; but that when he was put back upon the stand on the following morning, and after he had admitted that he had, in the meantime, been talking about the situation with counsel for the plaintiff, he testified that the defendant had called up the garage on

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the occasion in question and that the witness answered the telephone, and the defendant asked if his car was there and the witness told him it was; and the defendant then asked the witness if he would bring it over right away, and the witness replied that he would; that he was delayed somewhat, in the course of his work, before taking the car over, and after he had left the garage and was on the way, the accident involved in this case happened; that upon reaching the defendant's house he talked with the defendant and told him about the accident, and then delivered the key to the car into the defendant's possession. Counsel argue "This change in testimony has all the ear-marks and appearance of having been inspired, and, of course, has not the force and value of testimony fairly given when a witness is first interrogated." In passing upon a motion to direct a verdict, the trial court may never consider what the "force and value" of evidence submitted on behalf of the plaintiff is. The only question then before the court is whether or not the plaintiff's case, including all reasonable inferences that may be indulged in its favor, is such as to make out a prima facie showing, and if there is any evidence, beyond a mere scintilla, tending to support the plaintiff's case, the motion to direct a verdict for the defendant should be overruled. The question of the weight of the evidence or what its force and value may or may not be, is never a question for the court on a motion to direct a verdict. Libby, McNeill & Libby v. Cook, 333 Ill. 206. Likewise, we are not concerned on this appeal with the question of the strength of the case made out by the plaintiff. We do hold, however, that it was sufficient to make out a

prima facie case, and that the motion to direct a verdict should have been overruled.

This court has recently had occasion to pass on a number of cases, involving automobile accidents, in which the question of ownership and control were involved. We have endeavored in those decisions to give a clear statement of the law which has to do with such situations. Bosco v. The Boston Store of Chicago, 339 Ill. App. 564. Mansfield v. Schapiro, Illinois Appellate Court, First Dist., case #29045, not yet reported; opinion filed October 30, 1934; Densby v. Bartlett, Illinois Appellate Ct. First Dist., case #29235, not yet reported, opinion filed February 11,1935; Howard, Admx. v. Amerson, Illinois Appellate Court, First Dist., case #29235, not yet reported, opinion filed April 29, 1935.

For the reasons stated the judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

162 - 29578

P. S. HANSEN,
Appellee,

v.

GEORGE K. GATSIS,
Appellant.

239 I.A. 648

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $400, recovered against him by the plaintiff in the Municipal Court of Chicago. The plaintiff brought suit to recover a commission which he claimed was due him from the defendant by reason of the fact that the defendant had placed a piece of property he owned, in the hands of the plaintiff for sale and that the plaintiff had procured a buyer on the terms stipulated by the defendant.

The plaintiff testified that he was in the real estate business and that the defendant called at his office and requested the plaintiff to see if he could find a buyer for the property in question, at a price of $15,000, the buyer to assume an existing $5,000 mortgage on the property, pay $7,500 in cash, and give a second mortgage securing the payment of a balance of $2,500, of which $500 was to be due "on or before" one year and $2,000 "on or about two and one half years." Plaintiff further testified that he

discussed the matter of a commission with the defendant at the time the property was thus submitted to him and that they agreed on a commission of $600. The plaintiff secured a purchaser of the defendant's property, whose name was Stine, at the terms above set forth and secured Stine's signature to a Real Estate Board form of contract, on that basis. Apparently this purchaser was secured on the evening of the day the defendant employed the plaintiff to find a purchaser. On the following morning the defendant called the plaintiff up and asked him what success he had had and the plaintiff told him that he had a purchaser signed up, on the contract. Later that day the plaintiff went to meet the defendant at an address which had been given by the latter, which turned out to be a retail market and vegetable store. The plaintiff testified that when he arrived at this place, the defendant was there talking with two or three men, in a foreign language which he could not understand, and that shortly thereafter the defendant approached him and stated that these friends of his did not want him to sell his property and had told him if he ever needed money they would help him out; that the plaintiff explained to the defendant that he had done the work that was expected of him, in connection with the transaction, and the defendant said he realized that and was sorry about it but that he did not "want to be bad friends" with the others who were present and who were advising him not to sell; that the plaintiff asked the defendant what he proposed to do about payment for the services he had rendered, and the defendant assured him he wanted to pay him. Some weeks later the defendant came to the plaintiff's office and had another talk with him along the same lines. On the

latter occasion, the plaintiff testified, the defendant told him he did not like to pay a commission without getting some money out of the property, whereupon, the plaintiff again assured the defendant that the party he had procured was willing to buy the property and if he wanted to get his money out of it, he could proceed with the sale, and the defendant thereupon told the plaintiff that if he would wait awhile he (the defendant) would be able to sell the property for more money, and he assured the plaintiff that he would then pay him his commission.

The contract which the plaintiff had procured the purchaser, Stine, to sign, was introduced in evidence. By the terms of this contract, Stine agreed to buy the property for $15,000, and the defendant agreed to convey good title thereto, by a general warranty deed, subject to existing leases; all taxes and assessments levied after the year 1922 to be prorated to the date of the delivery of the deed; any unpaid special assessments for improvements not yet completed, and to unpaid installments of special assessments which fell due after 1922; also subject to any party wall agreements of record; to building line restrictions and building restrictions of record; and to an existing incumbrance of $5,000. The contract recited that the purchaser had paid $500, as earnest money, and it contained the usual stipulation as to the disposition of that money when the purchase was consummated, and by its terms the purchaser agreed to make a further payment of $7,000 within ten days after the title had been examined and found good, provided a warranty deed, conveying a good

and merchantable title was then ready for delivery. It was further provided that the balance was to be paid by the purchaser giving a second mortgage to secure $2,500, $500.00 to be paid "on or before one year after date" and $2,000, "two and one-half years after date thereof on or before with interest from the date hereof at the rate of 6 per cent per annum." The contract provided that a Torrens certificate of title or a complete merchantable Abstract of Title or merchantable copy of such Abstract, or a merchantable title Guaranty Policy issued by the Chicago Title & Trust Co., was to be furnished by the vendor, within a reasonable time, which, upon the consummation of the sale was to remain with the vendee. The contract contained the usual provisions as to the examination of title and the specifying of objections to be found by the vendee, if any, which, if they were found and specified, were to be cured within 60 days after notice. The contract also provided as to what disposition was to be made of the earnest money, in the event the purchaser failed to perform the contract according to its terms.

An employee of the plaintiff testified in support of the plaintiff's version of the conversation between the parties, in which the defendant listed his property with the plaintiff, and particularly, with regard to the terms of the sale, as the plaintiff had testified to them. Stine, the prospective purchaser, also testified for the plaintiff, identifying his signature on the contract in evidence and testifying that he paid the plaintiff $500.00 as earnest money, at the time the contract was signed; and that he was at that time, and also was at the time of giving his testimony, ready, able and willing to proceed with the purchase of the property according to the terms

of the contract.

The defendant testified that he listed the property in question with the plaintiff at a price of $16,000, telling the plaintiff that if he could get him $15,000 for the property,- half cash, he would sell at that amount, or he would sell for $15,000, all cash. He further testified that the plaintiff explained that it was hard to make sales on a full cash basis but that he would try to get $15,000 in cash, and the defendant said that he would not sell his property if he did not get the entire purchase price in cash, at least beyond the amount of the existing mortgage. The defendant testified that two or three days later the plaintiff called him up and tried to get an exclusive contract, and the defendant declined to make any such arrangement; and that about a week later the plaintiff told him he had a party willing to buy at $15,000, and pay $7,500 in cash, "and balance to be paid, I guess that was, in two years; $500 each spring. I don't exactly remember that;" that the defendant then told the plaintiff he would not sell at that price and insisted upon getting all cash beyond the amount of the existing mortgage. The defendant testified further that the plaintiff later submitted the written contract signed by Stine and that the plaintiff proceeded to read it to him, and when he heard that $7,500 was to be paid in cash under this contract, he declined to sign it, saying; "If I don't get my money I won't sign. That is all." The defendant denied that he ever told the plaintiff that he would sell at a price of $15,000 with $7,500 in cash. On cross-examination the defendant admitted talking to the plaintiff in his office, but denied seeing there at that time the employee of the plaintiff who had testified in his behalf to the effect that he was present

and heard the conversation. One of the men who had been present at the meat market, at the time of the conversation testified to by the plaintiff, testified in support of the defendant, saying that he heard the defendant tell the plaintiff at that time, "If I can get the money cash, I will sell my property; otherwise, the deal is off, that is the whole thing."

At the close of all the evidence the defendant requested the court to give the jury a peremptory instruction to find the issues in his favor. That motion was denied and the written instruction submitted therewith was marked, "refused;" the court holding that the evidence presented a controverted question of fact which should be determined by the jury. In contending in this court that the trial court erred in denying his motion for a peremptory instruction, the defendant argues that the trial court should have allowed his motion, because even if the terms stipulated by the defendant, when the property was listed for sale with the plaintiff, were those testified to by the plaintiff, nevertheless, the plaintiff could not recover because the terms of the contract of purchase, which was submitted by the plaintiff and to which he had procured the signature of Stine, were materially different from those so stipulated by the defendant, according to the plaintiff's testimony. It will be noted that the terms of payment which the plaintiff testified had been stipulated by the defendant at the time the latter listed the property with the plaintiff for sale, and the terms of payment as set forth in the contract of purchase, signed by Stine, were the same, namely, Stine was to assume the existing $5,000 mortgage; pay $7,500 in cash and secure the balance of $2,500 by a second

defendant.

mortgage, $500 of which was to be paid on or before a year, and $2,000 of which was to be paid on or before two and one-half years. The defendant contends that the terms of the contract, as to payment, were not the same as the terms of payment stipulated by him, even as testified to by the plaintiff, because the latter called for a payment of $7,500 in cash, whereas the contract recited the payment of $500 as earnest money, at the time the contract was signed by Stine, and called for the further payment of $7,000, "within ten days after the title has been examined and found good." That this contract which was procured by the plaintiff and signed by Stine, called for a cash payment of $7,5000, is too clear for any possible controversy. The terms set forth in the contract specifying that a certain part of this cash payment had been made in the form of earnest money and calling for the payment of the balance within 10 days after the title had been examined and found good, are the terms that are always present in contracts of this kind involving cash payments.

The defendant further contends that the plaintiff was not in a position to recover in this case, because the written contract which he got Stine to sign differed from the terms of the authority which the defendant had extended to the plaintiff, as a broker, even as testified to by the plaintiff, as to all the stipulations in the contract, apart from those of payment, - such as those requiring the defendant to furnish an Abstract of Title, or a Guaranty Policy or a Torrens Certificate, and requiring the defendant to convey by warranty deed, and so on. In our opinion, this contention is equally untenable. The evidence shows,

and indeed the defendant admits that he listed his property with the plaintiff for sale. The two parties differ on the terms of payment that were specified. On that issue, of course, this court is in no position to say that the verdict and judgment appealed from are against the manifest weight of the evidence. The written contract of purchase and sale which the plaintiff got Stine to sign, was the usual form of Real Estate Board sales contract. All of the provisions it contained were those usually found in contracts of sale of real estate. If the terms of payment specified by the defendant at the time he listed the property with the plaintiff, were as testified to by the latter, and the plaintiff followed them up by procuring Stine as a purchaser, and getting his signature on the written contract introduced in evidence in this case, clearly the plaintiff earned his commission. The defendant cites the case of Sattler v. Oliver, 138 Ill. App. 310, affirmed in 233 Ill. 541, and argues that that case presents the precise question which he is urging here, and that the decision there made is such as to support his contentions. We do not so read the decision of that case, either in this court or in the Supreme Court. Some of the things stated in the course of the opinion filed in this court, might be given the interpretation contended for by the defendant, but both in this court and in the Supreme Court it was pointed out, in the course of the opinions, that the terms of sale on which the plaintiff in that case was authorized to sell the defendant's property, involved a price of $50,000; one-fourth in cash and the balance in one, two and three years, at 5 per cent interest, while the contract which the plaintiff pro-

cured in that case called for a payment of $50,000, one-fourth in cash,- or what amounted to the same thing, a payment of $2,000 as earnest money and a payment of $10,500 within five days after the title should be examined and found good, - and $12,500 "on or before" the dates fixed in the terms as stipulated by the defendant. The Supreme Court stated that "without considering other stipulations of the contract, which are claimed to be deviations from the authority," it was clear that the payments to be made by the purchaser, under the contract, were not within the terms prescribed by the defendant, for the latter called for the deferred payments in one, two and three years, with interest at 5 percent, while under the contract the buyer was given the option of making the deferred payments "on or before" the dates stipulated, and under those terms the purchaser could have paid the entire amount at any time after the delivery of the deed. Such a decision in no way supports the contentions of the defendant in the case at bar. Other authorities to which the defendant has called our attention might be similarly distinguished.

The defendant contends further in support of his appeal, that the trial court erred in overruling his objection to a question put to the plaintiff by his counsel, asking him whether the terms outlined in the written contract signed by Stine, which had been introduced in evidence, were the same as those given to the plaintiff by the defendant. That question wasobjectionable for obvious reasons. Objection is also made to the effect that the conduct of the trial

court was such as to prejudice the defendant before the jury. We have examined the record in this connection and are of the opinion that while some of the matters to which counsel refers were not objectionable, there were a few remarks made by the trial judge in the course of the trial which might better not have been made. However, we are of the opinion that there was nothing either in connection with the remarks made or the rulings on the evidence by the trial court, which would warrant a reversal of this judgment.

For the foregoing reasons, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

177 - 29593

N.H. VALENTINE,

Appellee,

v.

TONY PAGONES,

Appellant.

239 I.A. 648

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse an order overruling defendant's motion to vacate a judgment entered against him, by confession, in the Circuit Court of Cook County, for $1115.00 and costs, upon a judgment note. The note was drawn to the order of John R. Nye. The word "we" appears both in the body of the note and in the warrant of attorney following. The note was signed "Page's Bake Shop, by Tony Pagones." The note was endorsed by the payee, Nye, and also by R. S. Valentine and the plaintiff, N. H. Valentine. Across the top of the face of the note there had been written in ink the words, "This note is secured by chattel mortgage of even date," after which a line had been drawn through those words.

While it is true, as the defendant contends in support of his appeal, that a several judgment cannot be entered against one of the parties to a joint note, with a joint warranty of attorney, we are of the opinion that the situation presented in the case at bar does not make that rule applicable. Where the word "we" is used in the body

of a note and the warrant of attorney and the note is signed by an individual, the document is such as to support a judgment against that individual. The maker of this note was apparently Tony Pagones, doing business as Page's Bake Shop. The defendant makes no point of the fact that he was not sued in that manner but after the judgment was entered he sought to file his appearance and defend on the merits.

Within the judgment term, the defendant appeared and made a motion to 'strike the judgment,' for 'errors apparent on the face of the record.' This motion was denied. Thereafter and still within the judgment term, the defendant submitted his motion to vacate the judgment. This motion was supported by the defendant's sworn petition, in which he set forth that he had a meritorious defense to the whole of the plaintiff's demand and that the nature of his defense was as follows: That neither the plaintiff, E. H. Valentine, nor his indorser E. S. Valentine was ever or is now an innocent and bona fide holder for value before maturity of the note in question, but that, on the contrary, both of them at all times knew of the facts surrounding the giving of the note as they were set forth in the defendant's petition; that the plaintiff never paid any value for the note but was merely the nominal plaintiff whose name had been used in these proceedings with intent to attempt to cut off any defense that the defendant might have against the maker, and that the real plaintiff was the payee, Nye. The defendant further set forth in this petition that the note sued upon had never, in fact, been duly executed and delivered by him to the payee, Nye, but that certain negotiations were pending between the defendant and Nye, for the purchase by the defendant from Nye

of a doughnut making machine, and that in connection with that purchase, Nye tried to persuade the defendant to execute a chattel mortgage, - presumably to secure deferred payments,- but that the defendant refused to execute such a mortgage and no such mortgage was ever executed, but that this note, which was to have accompanied such a mortgage, if it had been executed, was inadvertently signed by the defendant, and that such a note, in fact, was never intended to be delivered to Nye, but that the understanding and agreement between them was that the purchase of this doughnut making machine was to be a matter involving merely an open account between the parties. The defendant further set up that the doughnut making machine in question had been installed by Nye in the defendant's bakery at the latter's request and that Nye had made certain representations and warranties with regard to that machine and that there had been a breach as to these warranties and that the machine proved useless; that the defendant paid Nye $1800 on account of the purchase price of the machine when it was installed and that the balance of $1,000, which was the amount of the face of the note sued upon, was to be paid only if the machine operated satisfactorily; that it had not so operated and that the defendant had abandoned its use and notified Nye to take it out.

The defendant's motion to vacate, supported by his petition, was denied. In our opinion, the court erred in that ruling. The defendant set forth a good defense to the plaintiff's suit on the note, in his petition supporting the motion to vacate. If the two Valentines took the note without value and with knowledge of the facts set forth in the petition,

they took it subject to all defenses the defendant might have on the note, as against Nye, and if the further facts set up in the petition were true, the defendant, of course, had a complete defense as to Nye.

The order overruling defendant's motion to vacate the judgment is reversed and the cause is remanded to the Circuit Court of Cook County with directions to enter an order allowing the defendant's motion and for further proceedings not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

TAYLOR AND O'CONNOR, JJ. CONCUR.

187 - 29603

GEORGE LAMKO, a minor, by FOREMAN BROTHERS BANKING COMPANY, his guardian,

Appellee,

v.

SAMUEL KIRSCHENBAUM,

Appellant.

239 I.A. 648

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $3,000.00, recovered by the plaintiff, Guardian, in the Superior Court of Cook County, in an action brought to recover damages occasioned by injuries received by the minor, when he was struck by an automobile owned and driven by the defendant.

The defendant contends, in support of his appeal, that the trial court erred in admitting certain X-Ray photographs in evidence, over defendant's objection, to the effect that the preliminary proof with reference to them was not such as to make them competent. The minor was an infant, a little over two years of age when he was injured. He suffered a broken right clavicle and his left hip was also affected so as to cause a limp when he walked. The broken clavicle healed satisfactorily so as apparently to give him the full use of his arm. The limp was caused by a tipped pelvis, the tipping taking place in the vertebrae of the spine. The tipping of the pelvis had the effect of bringing the left leg up so that it was half an

inch higher than the right leg, thus causing the limp when the child walked. The doctors testified that this condition was permanent. A specialist in orthopedic surgery testified that a tipped pelvis is due in some instances to congenital causes and in others is caused by a traumatic injury. In answer to a hypothetical question, giving a history of this child's experience at the time of the occurrence in question, this doctor gave it as his opinion, that the injuries he received were such as might result in the pelvic condition described. The doctor who took care of the child at the time he was injured, testified that about a week after the accident, he complained of pain in the left hip, and he showed a limp when he walked. Certain X-Ray photographs of this child's pelvis were taken at the direction of the specialist referred to, in November, 1923, which was about a year and five months after he was injured. When they were offered in evidence, counsel for the defendant objected to them on the ground that proper qualification for their admission had not been made. It is the defendant's position that before such photographs may properly be received in evidence, the preliminary proof regarding them must consist of testimony by the doctor, to the effect that he had looked at the patient's affected part through a fluoroscope and had seen the condition present and that it was the same as that pictured in the photograph or the preliminary proof must include testimony by the one who took the pictures, to the effect that he is skilled in the use of the X-Ray machine and in the taking and developing of such pictures and that he took the picture offered in evidence, with the patient's body in a given described position, with a machine in good and

and accurate working order, and that from his experience he can say that the picture produced by the machine was an accurate picture of the internal condition of the patient's body. In this contention the defendant relies on the case of Stevens v. L. S. R. R. Co., 306 Ill. 370. That case involved a condition of the plaintiff's skull. The doctor, on whose testimony the X-Ray photographs were received in that case, did not state that he saw the condition of the patient's skull, nor that the X-Ray photographs offered in evidence correctly represented that condition, nor did he state how the photograph was taken, nor that he had ever had any experience with an X-Ray machine or had ever made an X-Ray photograph or that he knew anything about how they ought to be made, or that the machine used in making the pictures offered, was in good accurate working condition. In the Stevens case, the Supreme Court said that before X-Ray photographs may be received in evidence, it must be established by competent evidence that they correctly portray the conditions which they purport to. The court then points out that this requirement would be met by such preliminary proof as the defendant here insists upon, to which we have referred above. The court then said, "These methods of establishing the accuracy" of such photographs "are not exclusive but whatever method is used," their accuracy must be established before they are admitted. The court there also said that "the rule in regard to the use of ordinary photographs on the trial of a cause, applies to skiagraphs of the internal structure and condition of the human body taken by aid of X-Rays, and such a skiagraph, when verified by proof that it is a true representation, is ad-

missible in evidence." In our opinion, the X-Ray photographs received in evidence in the case at bar, were sufficiently so verified. The witness who gave the testimony which verified these photographs, was the specialist in orthopedic surgery to whom we have referred. The photographs were taken at his direction after he had examined the child's hips. The doctor was present when the photographs were taken. The photographs produced on the trial, he testified were the ones taken at that time. This doctor not only saw them but he testified he was present when they were developed. He was asked whether they were "correct representatives of the pelvis of George Lamko." Objection to that question was made by counsel for the defendant. After some argument counsel for the plaintiff asked if "these films" were "the pictures of George Lamko", and the doctor answered that they were. He also testified that he had had twenty years of experiance with X-Ray photographs which involved the reading of thousands of them. On that testimony we are of the opinion that the trial court did not err in admitting the photographs in evidence.

The defendant contends further that the verdict and judgment are against the manifest weight of the evidence in that it was shown that the defendant was not guilty of negligence in the operation of his automobile. According to the defendant's theory, which was supported by his testimony and that of his daughter who was riding in the car with him at the time of the occurrence and also by the testimony of two other witnesses, he was driving his automobile in an easterly direction along Hastingsstreet in the City of Chicago, and was going twelve to fifteen miles an hour, with his right

wheels six or eight feet from the south curb of the street. The child who was injured was standing at the edge of the sidewalk with his mother. The testimony submitted in behalf of the defendant is further to the effect that just before the defendant's car reached a point opposite them, the child ran into the street and was struck but was not run over. The defendant's daughter said the car was four or five feet from the curb and that the child took two or three steps into the street before being struck. On that theory it may be that the defendant could not be said to have been negligent in his operation of his car or that he could reasonably be required to anticipate that the child would leave his mother, who had hold of his hand, and run into the street just as the defendant was reaching the point where the child and his mother were standing.

But the plaintiff's theory, supported by the testimony of the child's mother and two other witnesses, was that the defendant drove his car down the street at a rapid rate with the right wheels running in the gutter. The child was standing with one foot on the sidewalk and one in the street and as the car passed, it struck the child and rolled him into the street. After striking the child the car turned over toward the north side of the street and stopped after running about a hundred feet. No horn or other warning signal was sounded. The child's mother testified that she was standing, talking to a neighbor and that she had hold of the boy's hand; that he pulled his hand out of hers and "got out into the street very quickly;" that he got one foot down on the street and had the other foot on the sidewalk when he was

struck, having moved "one step" away from her. She said the automobile was running "fast" at the time.

Another witness testified that the child put his foot down into the gutter when the defendant's car was about seventy-five feet away, but it did not change its direction or speed, nor was any horn sounded. He said the car was going, in his judgment, "twenty to twenty-five miles an hour." He testified further that the right front fender struck the child and at that time "the right side of the automobile was about half a foot away from the curb;" and that "the machine went the distance of about four houses or a hundred feet over toward the north side of the street and stopped."

Another witness gave similar testimony. She said the child put one foot down into the street and that "he stood, - he didn't move;" that when he did this, the machine "was about three houses away."

The defendant complains of the plaintiff's proof as to the speed at which his car was moving. One witness said he had never driven a car, but had ridden in them "three or four times a week for the last five years" and that in his opinion the car was traveling from fifteen to twenty miles an hour. The second witness above referred to said she never had driven a car and she could not tell how fast it was going, "but it was going fast." The child's mother testified to the same effect. That testimony was proper. The value of it was for the jury to determine. One need not qualify as an expert, to give an opinion as to speed. A lay witness may state that in his or her opinion a vehicle was going "fast" or "slow". As to how

fast it was going, or how slow, may be the subject of cross-examination. The witness who gave his opinion as to the speed of the defendant's car, in miles per hour, was shown to be competent to give such an estimate.

On the conflicting evidence in this record, both as to the speed of the defendant's car and as to its position in Hastings street as the defendant drove by the place where the child was, it was for the jury to say whether, in their opinion, the defendant was negligent and the record is such that, in our opinion, this court may not say that their conclusion, that he was, is against the manifest weight of the evidence.

For the reasons stated, the judgment appealed from is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

22613

197 - 22613

JOSEPH C. RHENDE,

Appellee,

vs.

THE CHICAGO DAILY NEWS COMPANY, a corporation., et al On appeal of THE CHICAGO DAILY NEWS COMPANY,

Appellant.

239 I.A. 648

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Rhende, brought this action for damages caused by injuries received by him when he was struck by a wagon alleged to be the property of the Chicago Daily News Company and driven by one of its servants. Originally there were two defendants, the present appellant (to which we shall refer as to the defendant) and one McRoy. The plaintiff was struck and knocked down by the wagon in question, at the corner of Halsted and Lake streets in the City of Chicago, shortly before five thirty o'clock in the afternoon of January 5, 1923. There are double track street car lines in both of those streets, which cross at right angles at that intersection. The wagon which struck the plaintiff was a single horse wagon. It was going west in the west bound or north track in Lake street. McRoy was driving a Ford car north in the north-bound or east track in Halsted street. The wagon crossed ahead of the automobile and the left side of the latter

Opinion filed Oct. 28, 1955.

vehicle struck the rear end of thewagon, swinging it over into the north roadway of Lake street where it struck the plaintiff and caused the injuries complained of. At the close of the plaintiff's evidence, the case was dismissed as to McRoy, on the plaintiff's motion. A motion by the other defendant for a peremptory instruction in its favor was denied. A similar motion was made at the close of all the evidence and again denied. The issues were submitted to a jury resulting in a verdict finding the issues for the plaintiff and assessing his damages at $3,000.00 to reverse which The Chicago Daily News Company has perfected this appeal.

The first contention made by the defendant is that the trial court erred in overruling its motion for a directed verdict at the close of the plaintiff's case and again at the close of all the evidence and in support of this contention three reasons are advanced. First, it is said there is no competent evidence in the record that the defendant owned the wagon which struck the plaintiff, or that it was being driven by its servant. The plaintiff testified that it was a Daily News Wagon; that he knew this from the fact that "The Daily News" was printed on the side of the wagon. At another point in his testimony he said the printing on the wagon was "The Chicago Daily News".

The testimony of defendant's witnesses was to the effect that the words on all its wagons were "The Daily News."

One Rogers referred to the wagon which struck

the plaintiff as "A Daily News Wagon with a white horse." He said he did not notice whether any words appeared on the side of the wagon; that he did not see "Chicago Daily News," or similar words on the wagon but "I could tell that it was a Daily News Wagon from seeing it so often,- general appearance * * * I have seen the white horse quite often." On cross-examination this witness admitted that he had told an investigator for the defendant, one Sperling, that the wagon which struck the plaintiff was not a Daily News wagon. He was asked if he had not had considerable trouble with one Winters, Manager of the classified advertising department of the News and he said, "I won't say that I have." He added, "It was on account of Mr. Winters that I made this statement to Mr. Sperling." A driver for the Chicago Daily News Company testified on its behalf, that he drove a white horse and that he had occasion to pass the intersection of Halsted and Lake streets between five and five-fifteen o'clock in the evening on his route but that he did not drive west on Lake street, but south on Halsted street and he did not have any accident at this corner on the day in question. In our opinion the evidence in the record on the question of ownership and operation of this wagon, was such that the court properly let that question go to the jury. There was sufficient evidence to warrant the jury in finding that the name of the Daily News was printed on the wagon. That makes a prima facie case of ownership. Kirn v. Chicago Journal Company, 195 Ill.App.197; Bosco v. The Boston Store, 239 Ill. App. 564.

The establishment of a prima facie case as to ownership, also involves a prima facie case to the effect

that the one driving the wagon was a servant of the owner then established. Howard, Admr. v. Amerson, Case No.29835, Ill. App. Ct., First District, opinion filed April 29, 1935, not yet reported.

The second reason advanced by the defendant for the contention that the trial court should have directed a verdict in its favor, is that the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law. In our opinion that contention is clearly untenable. The plaintiff was on his way home from his place of employment which was on the north side of Lake street, a block west of Halsted street. To go to his home he took a north bound car on Halsted street. He approached Halsted street from the west walking on the north side of Lake street, on his way to the southeast corner of the intersection where he would get his car. He paused on the edge of the sidewalk on the north side of Lake street, opposite the west crosswalk on Halsted street. The traffic at this point was heavy in both directions at this time of the day. As the plaintiff stood at the point last mentioned, east and west traffic was passing in the street. There was no crossing policeman there at the time to direct traffic. The plaintiff testified that the north and south traffic in Halsted street started as he left the curb at the northwest corner and stepped several feet to the south; that he saw nothing approaching from the east as he left the curb; that after he had gone several feet across Lake street, walking south, he again looked east and saw a horse and wagon coming in the westbound or north track in Lake street; that at this

time the horse had about reached the northbound or east track on Halsted street; that he (the plaintiff) then turned east and started to walk across Halsted street several feet north of the north track on Lake street; that the horse and wagon swerved slightly to the north, apparently to keep out of the way of McRoy's car that was coming north in the northbound track in Halsted street, and then turned back into the car track; that when he saw the horse and wagon swerve to the north, he stepped back a step or two; that the rear end of the wagon then swung out to the north and struck him; and that the horse drawing the wagon was being driven at a gallop. That being the plaintiff's case as to his course at the time of the occurrence in question, it may not be said, in our opinion, as a matter of law that he was guilty of contributory negligence, as the defendant contends. The question was properly left to the jury.

The third reason advanced by the defendant in this connection is that there is no evidence showing that the driver of the wagon was negligent or, if he was, that such negligence was the proximate cause of the plaintiff's injuries. It would seem to be clear that it could not be said as a matter of law that the driver was free from negligence in driving into this intersection on the gallop at a time when the traffic was heavy, as the evidence tends to show he did. We are further of the opinion that it is equally clear from the evidence already referred to, that such driving on the part of the driver of the wagon was the proximate cause of the injuries suffered by the plaintiff.

In the exercise of a reasonable degree of care, the driver should have anticipated the probability that in driving his horse at a gallop into such a crowded intersection, a collision might occur with some other vehicle cominggin from one side or the other, with results usually attending such occurrences. The driver might reasonably have anticipated the probability of the approach of such a vehicle as McNoy's car and a collision with it as the result of his careless driving.

Authorities need not be cited to the effect that, under such circumstances, there is no break in the connection between the driver's negligence and the injuries suffered by the one struck by the wagon as the result of a collision.

The remaining reason urged by the defendant for a reversal of the judgment appealed from, relates to the care and conduct of the jury after they had retired to consider their verdict. It appears that the jury retired to the jury room at the close of the trial, about noon on Saturday. There was no session of the court that afternoon. Shortly after the jury retired to deliberate upon the question of their verdict, the luncheon provided for the jurors arrived and was spread upon a table in the court room and the bailiff unlocked the door of the jury room and the members of the jury had their luncheon, after which they returned to their room and the door was again locked. Several hours later there was a knock at the jury room door. The trial judge was not present. The bailiff went to the door and asked if the jury had reached a verdict. It had been agreed that if

a verdict was reached it might be sealed and left with the clerk. The jury, or some member of it, told the bailiff that no verdict had been reached, nor could there be, in such a room, and he asked to open the door and give the jury some air. The room, which was an inside room, without windows, was full of smoke. The bailiff opened the door and some of the jurors came out and walked about the courtroom, the doors of which were locked, and others remained in the jury room. After a few moments all the jurors returned to their room and the door was closed, but not locked. It so remained, and several times later in the afternoon the same thing occurred. The trial judge returned to his chambers late in the afternoon and his bailiff stepped out. Some minutes later the judge stepped out into the court room, looking for the bailiff. At this time the jury room door opened and one of the jurors came out into the court room and said to the judge, "We cannot arrive at a verdict. Do you know what to do?" The judge said, "I cannot help it." The juror then said, "Well, Judge, they are discussing the case about giving some money to this one of the defendants that was dismissed out of the case." The judge then held up his hands and said, "Don't discuss anything about this case with me, - you better go back to the jury room and try to get a verdict." Thereupon the judge returned to his chambers. Shortly thereafter the verdict, on which the judgment appealed from was based, was returned. Several days later, information came to the trial judge as to certain things which were alleged to have occurred in the jury room after the conversation between the judge and the juror, to which we have referred, and all

the jurors were brought into court and examined in the presence of counsel.

It is conceded by counsel for the defendant that the affidavits or testimony of jurors will not be received to impeach their verdict. Sanitary District of Chicago, v. Culbertson, 147 Ill. 385. Complaint is not made, therefore, because of anything that occurred in the jury room, among the jurors themselves, but it is the contention that the conduct of the bailiff was such that the court room became the jury room, and that when the judge stepped into his court room, seeking his bailiff, he, in effect, invaded the jury room and that he there erred in conversing with a juror in the absence of the parties or their counsel, the jury having retired to consider their verdict and having not as yet reached any verdict.

That this jury was handled in a rather loose manner, to say the least, seems apparent. But, in our opinion, it may not reasonably be contended that the trial judge, at any time, invaded the jury room. Nor are we able to see how the few words which passed between the judge and the juror could have had any effect on the action of the jury. We are not at liberty to consider anything which may have taken place in the jury room, nor is that urged upon us by the defendant. Under the circumstances disclosed by this record, we are of the opinion that the words exchanged between the trial judge and the juror ought not to vitiate the verdict, as we believe it could not work any injury to the defendant. Such was the holding of our Supreme Court in a somewhat similar situation

in Rafferty v. The People, 72 Ill. 37. In connection with this matter, counsel for appellant has called our attention to a number of cases, and among them, Crabtree v. Hogenbaugh, 23 Ill. 349; Chicago & Alton Railroad Co. v. Robbins, 159 Ill. 598; Mound City v. Mason, 262 Ill. 392 and People v. Rank, 305 Ill. 593. In all these cases there was communication between the judge and the jury on some matter directly referring to a subject involved in the jury's deliberations where it was possible, or probable, that the action of the court would affect the action of the jury. The circumstances presented in those cases were, therefore, not similar to those involved here, in our opinion.

For the reasons given, the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

206 - 29623

239 I.A. 648

FULLER BROWN COMPANY,
a corporation,

Appellee,

v.

WILLIAM H. DEVITT,

Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $257.69 recovered against him by the plaintiff company in the Municipal Court of Chicago.

The plaintiff's statement of claim declared upon a written proposition signed by the defendant, addressed to the plaintiff, in which the defendant requested the plaintiff to make such shipments of merchandise to one Kenny, as the latter might request from time to time, "on thirty days time," which account the defendant agreed to pay within sixty days, his liability, however, not to exceed Five Hundred Dollars. This agreement contained the following paragraph, "I request that you notify us promptly if not paid in thirty days, but I hereby waive notice of credit extended to him, of extension of time and of your acceptance of this Letter of Credit."

The plaintiff alleged in its statement of claim that the balance due it from Kenny became an account stated

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between plaintiff and defendant on a given date. In support of his appeal the defendant alleges that no proof of an account stated was made and that it does not appear from the statement of claim that the plaintiff sought to recover on any other theory. [illegible] It appears that in its statement of claim, the plaintiff alleged that "relying upon said guarantee, it sold and delivered to the said George H. Kenny, goods, wares and merchandise at his special instance and request," and that there was due the plaintiff from Kenny a balance of $357.69 as shown by an itemized statement included in the statement of claim.

In his affidavit of merits the defendant demanded strict proof "that said merchandise as stated in the statement of claim was furnished" to Kenny. Defendant now claims that such proof was not made. It is impossible for this court to tell from an examination of the record in this case whether it contains all the proof. At the opening of the hearing counsel for the defendant called the court's attention to a number of questions and answers contained in a deposition which had been taken in the plaintiff's behalf and made objections to them. After considerable argument, most of the objections were overruled and apparently counsel for the plaintiff then read the deposition to the court. What the deposition contained we cannot determine, for the only thing appearing in the bill of exceptions at this point is "(Here follows reading of the same deposition)". There is nothing in the record to indicate whether the questions and answers set out in connection with the objections made by counsel

for defendant, previous to the reading of the deposition, were all there were.

The motion made to suppress this deposition was based on the theory that certain answers were incompetent as stating conclusions. This motion was not disposed of before the trial, as it should have been. On the trial it was overruled. This was proper as the reasons advanced in support of the motion were clearly untenable. The answers were not incompetent for the reasons suggested but were entirely proper. It would serve no purpose to set them forth here.

The contract sued upon was valid. The consideration for it was furnished when the credit was advanced to Kenny. Notice of acceptance of it by the plaintiff was expressly waived.

The only further argument advanced by the defendant in support of his appeal is to the effect that, under the terms of the contract, if any shipment was not paid for within thirty days "it became the duty of the plaintiff to protect the defendant by refusing to ship further goods until said shipments were paid." It is sufficient to point out as to this contention, that it was not pleaded by the defendant in the affidavit of merits he filed. The defendant will be limited as to the defenses urged, to those included by him in his pleading. The defendant does allege in his affidavit of merits that he did not receive notice within thirty days after bills became due and payable, that they were delinquent and says that if he had, he would have had an opportunity to

cancel his obligations under his contract. No such contention is advanced by the defendant in the argument presented by him in the brief filed in this court and it will, therefore, be deemed to have been waived by him.

The defendant offered no evidence at the trial.

For the reasons stated the judgment appealed from is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

224 - 29841

DE LUX CAB COMPANY,
a corporation,

Appellant,

v.

DANIEL HEENAN,

Appellee.

239 I.A. 649

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1935.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff corporation brought this fourth class action in tort against the defendant to recover damages caused to one of its cabs, when it collided with a touring car owned and driven by the defendant. The collision occurred about ten forty-five in the evening on November 19, 1932, at a point a little south of Ninth street on Michigan Boulevard in the City of Chicago. There was a light rain and some snow falling and the street was slippery. The plaintiff's cab was being driven south on Michigan Boulevard with a passenger destined for the Illinois Central Depot, a block or two south of the point of the collision and east of Michigan Boulevard. The heavy southbound theatre traffic was on in Michigan Boulevard. The plaintiff's cab was being driven south a few feet west of the center line of the street.

The northbound traffic at this time was not as heavy as the southbound traffic. The defendant was driving his car north and he testified he was driving a few

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feet east of the middle line of the street. There was much contradiction in the testimony as to the speeds of the respective cars and as to the positions they occupied immediately after the collision. The testimony of the driver of the plaintiff's cab was to the effect that the collision took place west of the center line of the street and that he was unable to avoid it because the southbound traffic to his right was such as to prevent his turning over in that direction. He was corroborated in this by a driver of a Yellow cab which was following the De Lux cab as it drove south and by two park policemen and a cab company inspector, all of whom arrived at the scene of the accident within a few minutes after it occurred. There was some further confusion in the testimony about what these witnesses considered the center of the street at the place where the collision occurred. As before stated the collision took place a little south of Ninth street. The evidence in the record shows that from Ninth street south to Eleventh street, the west curb of the street is twelve feet east of the west line of the curb north of Ninth street and south of Eleventh street. Some of the witnesses said they regarded the center line of the street at the point of the collision as being midway between the east and west curbs. It will be seen that this would put the center line of the street at that point six feet east of the center line of the street north of Ninth street and south of Eleventh street. Park Row runs east from Michigan Boulevard a little south of Eleventh street, which extends west from the Boulevard. The east line of Michigan Boulevard is a straight line from Park Row north.

The driver of the plaintiff's cab also testified that he first saw the defendant's car when it was about 300 feet south of him and that it came "zig-zagging" toward him on the west side of the street. There were some contradictions in the testimony of this witness but he was corroborated, in the main, as to the course of the defendant's car just before the collision, by the testimony of the driver of another cab which was driving north at the time and which was passed by the defendant's car a little north of Twelfth street.

On the other hand the defendant testified that he was at no time west of the middle of the street but was driving his car straight north and a few feet east of the middle; that suddenly the lights of the plaintiff's cab appeared ahead of him as it was driven out around a car which plaintiff's driver was trying to pass; that he (the defendant) turned to the right as far as he could to avoid the collision and was prevented from going any further than he did to the right, by other northbound cars which were on his right. He denied that the collision took place on the west side of the street.

On this conflicting evidence the questions of the defendant's negligence and of whether the plaintiff was guilty of contributory negligence as well as the question of whether the defendant was guilty of wanton and wilful negligence in driving his car, as charged by the plaintiff, were for the jury to pass upon and the evidence in the record is such that, in our opinion, this court cannot say that the verdict, finding the defendant not guilty, is against the manifest weight of the evidence.

If the record were free of procedural error, we would not disturb the judgment appealed from.

The plaintiff contends that the trial court erred in refusing to give its tendered instruction 10 and in giving instruction 13 tendered by the defendant. In our opinion there was no error committed with regard to the rulings on those instructions. The refused instruction was an abstract proposition of law, giving, verbatim, the provisions of the Illinois statute relating to the speed of motor vehicles on the public highways of the state. Much of it had no possible application to any of the facts involved here. It is not error to refuse such an instruction. The given instruction complained of told the jury that, even if they believed from the evidence that at and prior to the time of the collision the defendant was driving his automobile at a speed in excess of twenty-five miles an hour, nevertheless, if they also believed from the evidence that such rate of speed was not unreasonable or improper, having regard to the traffic and use of the street at the time in question and was not such as to endanger the person or property of any person lawfully upon the highway, "then and in that case, proof of such rate of speed does not of itself establish that the defendant was guilty of negligence."

However, rulings on other instructions are complained of by the plaintiff in support of its appeal and, in these, we are of the opinion the trial court erred and, because of such error, the judgment appealed from cannot be permitted to stand. As already stated, the issues

presented in this case were involved in directly conflicting and contradictory evidence. The plaintiff charged that the defendant's conduct, as shown by the manner in which he drover his car, was so grossly careless, as to amount to wanton and wilful negligence on his part. There was evidence tending to establish that charge from which the jury might have so found without doing violence to the testimony. It was all a question of the degree of credibility the jury would attach to the testimony of the different witnesses. If the jury believed from all the evidence that the defendant's conduct was so grossly careless as to substantiate the charge of wanton and wilful negligence made by the plaintiff, then they should have found the issues in his favor even though they might further believe from the evidence that the conduct of the plaintiff's driver was not without some negligence. In a case presenting such a close question on a contested issue of fact, it is important that the jury be accurately instructed as to the law relating to it. The plaintiff's offered instruction 11, in connection with this issue, was refused and the defendant's instruction 20 was given. Both of these rulings are complained of and, in our opinion, in both of them, the trial court erred. By the instruction which the court refused, it was sought to tell the jury, as to the charge of wanton and wilful negligence, that an intentional disregard of a known duty, necessary to the safety of the person and property of others and an entire absence of care for the life, person and property of others, such as exhibits a conscious indifference to

the consequences, makes a case of constructive or legal wilfulness such as charges the person whose duty it was to exercise care, with the consequences of a wilful injury. The jury were further told that, in giving this instruction, the court must not be understood as expressing any opinion on the charge of negligence or as to whether such negligence, if any, was wanton or wilful in character. By this refused instruction it was further sought to tell the jury that, if they believed from all the evidence that the defendant was guilty of wanton and wilful negligence as charged, and further that the driver of the plaintiff's car failed to exercise reasonable care then such failure on his part "alone and in itself, would not deprive the plaintiff of the right of recovery in this case." That instruction stated the law correctly, and it should have been given. Waldren Express & Van Co. v. Krug, 291 Ill. 472. The instruction which the trial court did give told the jury that "wilful or wanton negligence means intentional negligence, and if you believe from all the evidence that the defendant did not entertain any ill will toward the plaintiff, and did not intend to injure its property, and did not intend or desire to injure the person or property of anyone, then you should find that he was not guilty of wilful or wanton negligence." That instruction should have been refused for it did not state the law correctly. The jury might believe from all the evidence that the defendant did not "intend" to injure any person or any automobile but if they believed that he did "intentionally disregard his known duty" and drive over onto the wrong side of the street at night when the street was in a wet and

slippery condition, and in the face of heavy south bound traffic, then they might reasonably conclude that, though no such intentions as are referred to in the instruction were present, nevertheless, the defendant showed a gross and utter disregard for the safety of others and a wilful indifference to the consequences of his negligent conduct and if so they might reasonably have found him guilty of wanton and wilful negligence.

The plaintiff complains further of the action of the trial court in giving instructions 16, 18 and 19. Instructions 18 and 19 were peremptory and told the jury, in effect, that they should find the defendant not guilty, if they believed that the plaintiff's driver had failed to exercise reasonable care. While instruction 16 was not, in terms, peremptory, it purported to be inclusive in its statement of the issues in the case and told the jury that, before the plaintiff could recover, it must prove by a preponderance of the evidence that the defendant was guilty of negligence which caused the collision and that the plaintiff's driver himself was free from any want of ordinary care. All these instructions ignored the issue of wanton and wilful negligence. In our opinion the giving of them was error.

For the reasons referred to in connection with the rulings of the trial court with regard to the instructions, the judgment appealed from is reversed and the cause is remanded to the Municipal Court of Chicago for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

336 - 29653

S. P. KRIEGER,
Appellee,

v.

PAUL H. BIRSE,
Appellant.

289 I.A. 649

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1935.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $376.44 recovered by the plaintiff in an action brought to recover the rent of an apartment for a given period. In the trial court the defendant contended that his written lease had been cancelled by an executed oral agreement for such cancellation duly made between the plaintiff and him. According to the testimony of the plaintiff no such agreement was entered into. The defendant vacated the apartment in question during its term, in April, 1933. Shortly prior thereto the plaintiff purchased some of the defendant's furniture and moved it into her (plaintiff's) apartment. Defendant contends this corroborates his contention as to the cancellation of his lease. In our opinion, this transaction is not inconsistent with plaintiff's theory of the case. We cannot say that the finding of the trial court, for the plaintiff, is against the manifest weight of the evidence.

In putting in his defense, the defendant's wife took the witness stand to testify as to her version of the conversation between the plaintiff and the defendant in which

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the latter claimed the plaintiff had agreed to a cancellation of the lease. The plaintiff objected that, being the wife of the defendant, she was not competent to testify in his behalf. In our opinion, the trial court did not err in sustaining that objection. It was contended that although the witness in question was living with the defendant in this apartment at the time of the conversation about which she sought to testify, she, in fact, was not then married to him but that she and the defendant had been married since then. That situation would not affect the question of her competency as a witness. Roxburgh v. Roxburgh, 162 Ill. App. 364.

For the reasons stated, the judgment appealed from is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

345 - 29762

MARY WENZ,

Appellee,

v.

MAURICE WILLIAMS, CHARLES WILLIAMS and CLARENCE WILLIAMS, trading as WILLIAMS BROTHERS,

Appellants.

239 I.A. 649

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

Opinion filed October 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for $300, recovered by the plaintiff, Mary Wenz, in the County Court of Cook County. The plaintiff brought her suit to recover $300 she had paid the defendants as earnest money on what she claims was a tentative purchase of certain real estate. She paid them this money on June 26, 1923, and on that date they gave her a receipt for the money, which recited that she agreed to buy the property and that "the undersigned as agent for the owner has agreed to sell" it for $10,300. The receipt then proceeded to set forth the terms of the proposed sale.

The plaintiff testified that at the time she was shown the property by one of the defendants, she liked it and told one of the defendants who was present, that she would buy it provided her husband liked it and approved its purchase. She then complied with the request to pay something down, and paid the $300 in question, on the agreement that the defend-

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ants would return the money if she notified them within five days that her husband had not approved the purchase. She further testified that her husband looked the property over, did not like it and that she accordingly notified the defendants, on June 28, that her husband did not want the property and she asked the defendants to return her money. She was corroborated in her testimony, by that of both her daughter and her husband (without objection as to competency).

Two of the defendants, on the other hand, testified that there were no conditions attached to the receipt of the money, nor any agreement or promise on their part to return it, as the plaintiff claimed.

The defendants contend that the receipt they gave the plaintiff was a contract of purchase and sale, binding the plaintiff. Clearly this is not correct, on this record. The defendants did not own the property. The receipt itself referred to them as "agent for the owner." No proof was made that the defendants had been authorized by the owner of the property to sell it. The only evidence in the record that refers to that subject, in any way, contains an inference that they had not been so authorized.

Such being the circumstances, the receipt was open to explanation. Richardson v. Hadsall, 108 Ill. 476. On that explanation the evidence was in direct conflict. On the plaintiff's proof she was entitled to recover. We cannot say, from the record, that the verdict of the jury and judgment appealed from, were against the manifest weight of the evidence.

For the reasons stated, the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

348 - 28765

4720

229 I.A. 649

S. SCHMIDT,
Appellee,

v.

JOHN F. BARR and MALCOLM E. BARR,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant filed her bill for specific performance claiming that the defendant, John F. Barr, had made a contract in writing with her, wherein he had agreed to convey certain property for a specified consideration and that she had paid certain amounts to him and tendered the balance but that he had refused to carry out his part of the contract and had conveyed the title of the property to his son, the other defendant, Malcolm E. Barr, so as to prevent complainant's acquiring it. The complainant alleged that she had made payments aggregating over $4,000 to John F. Barr, on account of this purchase; that the total consideration named in the contract was $17,500; that she was to take the property subject to a mortgage of $8,000; and that she tendered $5,500 as the balance due under the contract, but that Barr refused to accept her tender or to convey his title.

By their answer the defendants admitted that John F. Barr received $250.00 from one Weitz, an agent, on the purchase of this property, but denied that they or either of them received the payments of $2,250 and $1,500 mentioned in the bill of complaint or that they executed a contract of sale bearing date March 21,1923, as alleged. John F. Barr alleged that he received a further sum of $750.00 from Weitz, making a total of $1,000 on account of this purchase and that he stood ready to convey title upon tender

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of the proper balance due on the purchase price. The defendants denied that title had been conveyed to Malcolm K. Barr, for the purposes of defrauding the complainant. There were other allegations in the pleadings not necessary to note here.

The chancellor heard the evidence in this case at different times over a period of about sixteen months, after which a decree was entered finding the facts as contended for by the complainant and awarding the relief prayed for by her. To reverse that decree, the defendants have perfected this appeal.

In opening the argument in the brief filed in this court in behalf of the complainant, counsel call particular attention to the fact that the defendants do not here contend that no contract was entered into for the sale of this property and that this "is quite a departure from the sworn answers" filed by them. In our opinion that contention is not borne out by the record. In their answers (which are not sworn to) the defendants denied that on March 30, 1933, they agreed or contracted to sell the property in question to E. Schmidt for $17,500 and they denied the execution of the alleged contract of March 31, 1933, but they expressly admitted receiving the payment of $250 in March from Veitz "on behalf of a principal unknown to the defendants," and they averred that a subsequent payment of $750 was made by Veitz "in connection with the same premises." Further, in their answer the defendants averred "that they stand ready and willing to apply the sum of one thousand dollars paid by said William M. Veitz, on behalf of his principal, to a purchase price of seventeen thousand five hundred dollars," upon the assuming of an incumbrance of $8,000 and the payment of $8,500 more in cash; and they further averred that upon those things being done "they will convey said premises by warranty deed to said principal."

The payment of $450.00 by the real estate agent, William M. Veitz, to John F. Barr is admitted. It was by a check of Veitz, drawn to Barr's order and it bears Barr's endorsement. The date of the check was March 30, 1932. Barr signed a receipt dated March 30, 1932, for the amount of that check and gave it to Veitz. Barr admitted that the signature on that receipt was his genuine signature. There is an irregularity about this receipt, as it appeared when received in evidence, which, in our opinion, in view of other evidence to be referred to later, is significant. Crowded in between the last line of the body of the receipt and Barr's signature, are notations of the two subsequent payments, claimed by complainant to have been made and which Veitz testified he did make to Barr but which the latter denies he ever received. These notations, clearly written on this receipt after Barr signed it, read as follows:

"Balance due $13500.00	3/31/32	cash	$2250.00
	4/11/32		1500.00"

This seems to be a bungling attempt by somebody to make it appear that Barr's signature on this document had the effect of acknowledging receipt of all three payments claimed to have been made in complainant's behalf.

Does the evidence show the two alleged payments of $2250.00 and $1500.00 to have been made? Barr says they were not. Veitz testified he paid Barr $2250.00 on the day following the $300.00 payment. Although the $300.00 payment had been by check, the $2250.00 payment, Veitz said, was currency. He did not have Barr sign a receipt for the $2250.00 because, as he explained, he considered the contract which he testified Barr signed upon the occasion of this payment, a receipt. This contract was received in evidence. It recites that a payment of $2300.00 had been made by the purchaser, on the contract price. Barr testified he never signed such a contract

and his contention is that his purported signature thereon is a forgery. We shall refer to this later. One Max Feilschmidt corroborated Seitz as to this payment, testifying that he went to Barr's office with the agent on March 31, 1933, between 9:30 and 10 o'clock in the forenoon and saw him hand Barr a lot of money which, Mr. Seitz told the witness, was $3,450.00, and also saw him hand Barr two papers and Barr signed them. Barr testified he had never seen this witness in his office on the date claimed or at any other time, but that he was present at the office of the Chicago Title & Trust Co., when an attempt was made six months later, to complete the sale. Seitz further testified that he paid Barr $1500 more, in cash, on April 11, 1933, at Barr's office and that at that time Barr gave him a receipt. There was received in evidence a receipt bearing that date purporting to acknowledge receipt of $1500.00 and to be signed by John F. Barr. The latter testified that he never received any such payment or signed any such receipt and he contended this purported signature of his was also a forgery.

A handwriting expert gave it as his opinion that the person who wrote the signatures "John F. Barr" on the receipt dated April 11, 1933 and on the contract dated March 31, 1933, both claimed to be forgeries by Barr, was the same person who wrote the signature "John F. Barr" on other documents in evidence, which admittedly bear the genuine signature of that defendant. On cross-examination he admitted the existence of certain points of dissimilarity between the signatures referred to. That these signatures appearing on these various documents, all reading "John F. Barr" were not made by the same person, appears to us beyond any reasonable doubt. We have these original documents before us (all the exhibits having been impounded by the Chancellor and certified to this court for our consideration) and in our opinion the signature "John F. Barr" on the alleged contract dated March 31, 1933, is clearly not a genuine signature, but a forgery. The letter "o" is omitted

from the first name (John) of the signature entirely, although space has been left for it. The name "John F. Barr" appears a few lines above this signature in the body of the contract, where it is provided that "This contract and earnest money shall be held by John F. Barr for the mutual benefit of the parties hereto." All of that is printed except the name "John F. Barr". It seems to us entirely clear that the one who wrote that name "John F. Barr" in the body of the contract also wrote the purported signature, "John F. Barr" at the bottom of the contract. It also seems apparent from a careful examination of this signature that whoever wrote it, went over it more than once or bore down on his pen so as to give the lines a heavier appearance than those in the body of the contract. Weitz testified on the question of who prepared the contract, "I made that up myself".

Another thing which we consider significant on the question of the genuineness of these disputed signatures is this; - The admittedly genuine signature of John F. Barr in this record, appearing on the receipt for $250, which he admits he signed and as an endorsement on the $250 check which he admits he received and endorsed, and on a letter he sent to Weitz in September, 1933 are all in blank ink. The two signatures which are claimed to be forgeries, being those on the contract dated March 31, 1933 and on the receipt for $1500, dated April 11, 1933, are both in ink of a peculiar purple color. Ink of that same color was used by Weitz in writing out his check for $250.00; the body of the receipt for that amount; the written part of the contract dated March 31st; and the body of the receipt dated April 11, 1933. That Weitz wrote out all these himself, appears without any doubt. As to those he is specifically asked about, he admits he made them out himself. He claims he made out the $1500.00 receipt in Barr's office. That receipt is on a form which Weitz testified he

furnished himself. Apparently the $250 receipt, which Burr admits contains his genuine signature, that signature appearing thereon in black ink, was written out by Veits in Burr's office for it was written on one of Burr's letter heads. But in our opinion, that fact does not affect the significant fact referred to, concerning the different colored inks. The entire body of this receipt is in the same colored purple ink which was used by Veits in writing his $250 check, all the written part of the alleged contract and the $1500, receipt. Moreover, we find Veits using the same colored ink in signing a typewritten letter to complainant on September 23, 1933. The record contains several letters to Burr from one of the lawyers for complainant, L. A. Sherwin, acting in this matter for complainant, in September, 1933, and in one of them we find Sherwin's signature in the same purple ink. Another odd thing, so far as the alleged $1500 payment is concerned is, it was in no way called for by the terms of the contract which Veits alleges he drew up and complainant executed.

Burr contends that on April 11, he did receive a payment of $750 from Veits but not in the form of cash, but a check. Was that payment made? Veits says it was not. In attempting to prove his contention as to this check, Burr offered to show that in the course of his business he kept no cash book but that the only record of this kind he kept consisted of duplicate bank deposit slips showing each item of his deposits in his bank and what they were for. He offered all his duplicate bank deposit slips covering the period from October 1931 to March 1933, to prove this customary way he had of keeping a record of his receipts. He offered a duplicate deposit slip of May 17, 1933 , showing a credit of $1705.24, followed by the memorandum "Increased loan from Strauss on corner building 4701-5 Indiana Avenue," together with his deposit book showing credit of that sum to him. This referred to the property involved here.

There had been a $8000 mortgage on the property and Seitz told Barr, his principal wanted to buy it subject to an $8000 mortgage and Barr agreed to have his loan raised accordingly and he testified that he did so and the deposit above referred to, was the proceeds of that increase in the mortgage on the property. Barr offered his duplicate deposit slip of March 23, 1923, showing an item of $250, (Seitz's check for that amount, dated March 20, 1923) with a notation after it to the effect that it was payment to secure the sale of 5703 - 5 Indiana Avenue, - the property in question. He further offered his duplicate deposit slip of April 14, 1923, showing a deposit of $750 followed by the notation "part payment from William Seitz on the sale of 5703-5 Indiana Avenue," and he also offered his bank deposit book showing an entry and credit of that amount on that day. He first testified that he received the check from the agent on that day. He later testified that was an error, - that he received it on April 11, and deposited it on April 14. Counsel for complainant call attention to a memorandum Barr used in connection with this testimony, which is in the record. That memorandum reads:

"March 31st 1923 $250.00
April 11th " 750.00
May 17th " Increased loan
Depos $250 on 23 March
" 750 " 14 April."

It appears that the first date, March 31, had originally been written March 23 and that the next one, April 11, had originally been written April 14. We cannot see that these changes signify anything of importance. Barr's testimony as to these receipts and deposits is clear, consistent and convincing, as we read it in the record. Objection was made to all the proof offered involving these deposit slips and in our opinion the chancellor erred in

sustaining it. An erroneous and mistaken view was taken of what Barr was attempting to prove, the court saying, in connection with the ruling sustaining the objection, that the reason the offered evidence wasobjectionable was "that it makes it possible for a man who has received money to make a self-serving document by showing that in all other cases his records show that he always put his money in the bank and has a detailed statement of deposits, and therefore you are asked to draw the inference, if you don't find this notation, that he never received this money. If a man is engaged in any fraudlent scheme, of course, he won't put the money in the bank. He will put it in his pocket." Barr was not trying to establish, by this evidence, that he had not received or deposited a certain sum of money. He was trying to establish that he had. His offered evidence tended to corroborate his testimony that Weitz did give him a check for $750 at this time toward this purchase. The fact that proof of that fact would tend strongly to discredit the testimony of Weitz that he had given Barr $1500 in currency on this purchase at that very time, could of course not affect the admissibility of evidence to prove a positive fact that the agent did pay him $750.

In connection with this payment Barr also offered in evidence the banks ledger sheets showing the account of Weitz in his bank, These showed a debit item of $750, (which the witness who kept the bank records testified was a check) against the account of Weitz under date of April 15, the day after Barr testified he deposited a check for that amount given him by Weitz. The Chancellor admitted these bank records, although he expressed doubt asto their admissibility for the same reason which had been given for theruling on the deposit slips. These records were clearly admissible, in our opinion. Here again, they were not offered to prove a negative but a positive fact, - not that no debit item appeared there for a contested amount but that one did appear there. On cross examination Weitz was asked if he had not given

Barr a check for $750 in April on account of this purchase and he would not be positive about it. His answer was "I don't believe I did. I don't really recall."

A subpoena duces tecum was served on Veitz to produce this cancelled $750 check and he said he could not do so, and in explanation he testified, "I haven't any checks." Heroes asked what he had done with them and he answered that sometime during the previous April or May (which would be in 1932, the year of the transaction in controversy) someone had broken into his office and carried everything off, "not only the checks and books, but everything in that office; they broke in and wrecked the whole place, and the place was blown up and couldn't find nothing in there." He testified that he was home sick at the time. He was then asked "the only check you saved out of it was the $650 check?" and he answered, "Yes." He added that he had turned that check over to complainant or her husband early in April when he got his cancelled checks back from the bank, - that he told complainant she could keep the check "as a receipt for the $650." He said he did not make that disposition of his cancelled checks as a rule but that he had "in that special instance." Later, counsel for complainant in questioning Veitz about this incident asked him several questions about "the fire occurring in your place." The witness explained here that after the fire the office had not been restored and one morning the police called him up and said "he caught the kids carrying out everything in the place." Later in the trial the defendants showed by the testimony of the two firemen, supplemented by the city records, that the fire in the office of Veitz occurred on March 23, 1931. It is rather difficult to see how a fire in March 1931, could be availed of to account for the absence of cancelled checks not drawn until a year after that. No attempt was made to show more than one catastrophe affecting the

office of Weitz.

The other defendant, Malcolm F. Barr, corroborated the testimony of his father, saying that he was present in his father's office on April 11, 1933, when Weitz came in and gave his father a check for $750. He said he knew it was that day because April 11, was election day and Weitz was a candidate for office. That this was a fact, is admitted. Malcolm F. Barr further testified that no receipt was signed by his father on that occasion.

The nominal complainant in this case is S. Schmidt, who appears, from the record to be a woman. She did not appear as a witness in this case and so far as the evidence shows, never appeared in connection with any of the negotiations or meetings of the parties with regard to this transaction. She is the wife of a witness who appeared in the case and gave his name as "Alex Schmidt." The signature appearing on the alleged contract of March 31, 1933 is "S. Schmidt." Weitz testified that the contract was signed in that manner by Alex Schmidt. The latter claimed to have a power of attorney from his wife, authorizing him to deal with her property as his own. Weitz also testified that he received the three amounts of $250, $3250, and $1500, from Alex Schmidt, - all in cash. He said he got the $1500 from Schmidt on the morning of April 11; that it was in $5, $10, and $20 bills and he took it right down to Barr's office because he did not want to carry it around with him. Weitz testified he got the $3250 from Schmidt at the latter's store on the morning of March 31, between 8:30 and 9 o'clock. He testified he had known Schmidt seven or eight years and during that time had sold him a number of pieces of real estate, and in that connection had received a number of Schmidt's checks, for $2,000 or $3,000 or such amount as the transaction called for, and that there were also "quite a number of times I got cash money from him".

Schmidt testified that he agreed to buy this property from Burr. Referring to the alleged contract of March 21, he testified that the signatures "C. Schmidt" was his. He said that when he signed the contract, there was no other signatures on it and that at that time he gave Weitz $2350 in currency; that Weitz returned the contract on the following day, with Burr's signature on it. He further said that he later gave Weitz $1500 and on April 13, Weitz delivered the receipt for that amount signed by Burr and dated April 11. On cross examination Schmidt testified he had known Weitz ten years and had purchased "lots of property through him." He was asked how many pieces he had purchased through Weitz and he said he "couldn't figure up how many ********** six or seven." He testified he kept two bank accounts. He then testified that he paid Weitz the $2350 on the morning of March 21, around 8 o'clock at his (Schmidt's) store. He was asked where he got the $2350 and he said he had it in his house; that Weitz called up on the 20th and "said I should have ready $2350 cash because he is going to bring the contract to sign;" that he ~~xxx~~ told him to have it in currency and he had it right there in the house. He was then asked if he didn't get some of it from the bank and he answered, "Well, I had some, some I take from the bank". The next question was, "How much did you get from the bank?" and he answer d, "I don't know how much. I have been depositing, four or five thousand dollars deposited, somwor less." Schmidt was the owner of a grocery and market and he was asked how much business he did there, and he answered, "Well, that is not the only store I have had. I have been holding a lot of contracts and stuff like that." He then testified that the the receipts in his store would run $300 on week days and $1,000 on Saturdays.

As bearing on the credibility of this witness, the defendants introduced in evidence, a petition filed by him in the

Municipal Court of Chicago, in June 1921, nine months before the his payment of $450 was made on the transaction involved here. In that case One Sarah Munsinger had confessed judgment for $125.00 against Schmidt on a lease, and this petition was filed by Schmidt in an effort to have the judgment opened up. In that petition he gave as one of the reasons to explain his apparent delay in presenting his petition, that "this defendant is a poor man, and was in no position to start any litigation without having documentary proof to substantiate his statement that the plaintiff perpetrated a fraud by confessing judgment in this cause" and that he had only recently found his duplicate copy of the original lease there involved.

There are other allegations in this petition which we consider material her. Schmidt there set out (judgment having been confessed against him for rent for the months of March to July, 1919 inclusive) that the plaintiff in that case executed her lease to him for a store, for a period of one year only, beginning October 1, 1917, with an agreement for two years more at his (Schmidt's)option; that on May 15, 1918, he sold his business carried on in the store which was the subject of this lease, and assigned the lease in writing to one Folsen "with full permission in writing by the plaintiff to make such assignment***** and was in writing by the plaintiff released and discharged from further obligations on said lease." Schmidt further set forth in this petition that the part of the alleged written lease showing the terms to be from September 1, 1917 to August 30, 1921, was not a part of the lease he had executed with the plaintiff but that "such insertion is a pure forgery and a fraud upon the defendant ********and was inserted subsequent to the time he had signed the lease." This petition further alleged that this lease had been prepared "by the the plaintiff's real estate agent, one William M. Neitz, who then and there had charge of the

premises for the plaintiff;" and that it was not until he (Schmidt) had found his duplicate original lease, which had been lost, that he had the means of showing by "documentary evidence, the fraud which has been perpetrated upon this defendant by the plaintiff, by the insertion by the plaintiff or his real estate agent (Weitz) of the different term entirely in said lease subsequently to the signing thereof by this defendant." This petition was sworn to by Schmidt, the notary public taking his acknowledgment, being L. A. Sherwin, one of the attorneys representing Schmidt and his wife in the case at bar.

Here we find Schmidt stating under oath, in June 1921, that he is a poor man in a suit against him for $135.00, and in the following spring, according to his testimony in the case at bar, Weitz called him up one day and told him to have $2550 in cash, and the following morning he turned that sum over to Weitz, in currency, before banking hours; and he further testified that his business brought in $2500 a week and that he had known Weitz for ten years and had bought so many pieces of property from him he could not state the exact number accurately, giving his checks for large amounts, and stating further that he had other sources of income than his grocery and meat business. And furthermore in the case at bar we have Schmidt testifying that he had been buying real estate through Weitz for years, paying him substantial amounts in cash and in checks, and Weitz testifying to the same thing, while less than a year before the transaction involved here took place, we find Schmidt charging Weitz with "forgery" as he put it in his petition, and fraud in materially altering a lease after he (Schmidt) had executed it, and swearing to it before the lawyer who represented him in the trial of this case, and also in the other case.

Weitz testified that when he gave Barr the $350 check on March 20, he told him he would "go and draw up the contract." He was asked, "Did you get a receipt for it that day?" and he answered that he did not. The receipt dated that day, March 20, did not appear in the trial of the case until counsel for complainant was cross-examining John F. Barr. At that time counsel showed him that receipt and asked if that contained his signature, and he said it did. Barr admitted a memorandum of agreement had been drawn up which he had signed. There are statements in the briefs filed by both parties in this court from which it would seem that counsel regarded this March 20, receipt as that memorandum agreement. Both defendants testified that this memorandum was drawn up by Weitz on a piece of paper he got at Barr's office, when he came there and gave Barr the $750 check in April. Complainant introduced a letter written to Weitz by Barr in September 1932, demanding return of "the agreement in writing for the sale" of the property in question, "delivered to you by me on or about April 15, 1932." Barr testified he was there referring to the memorandum above mentioned. That letter cannot in any way, in our opinion, be taken as indicating that the alleged contract of March 21, was executed by Barr, as complainant contends. The memorandum Barr referred to in his letter was apparently the one shown him on cross examination, dated March 20. When it was made is not clear, nor do we regard it as important. Weitz says he did not get it March 20. Both defendants say it was written in April.

It is also argued that Barr's testimony is weakened by the fact that in a suit by Weitz against him in the Municipal Court for commissions on this deal, he filed an affidavit of merits denying any contract existed, while he admits here there was one. That affidavit, of course, had no reference to any contract between Barr and this complainant, but to one between Barr and Weitz.

The record shows that on September 16, 1936, the lawyer Sherwin wrote a letter to Barr saying that his client, "S. Schmidt is tired of waiting for you to comply with the contract of sale;" that she had been and was ready to close the deal and pay the balance due; that she had been unable to procure the abstract or guarantee policy from Barr; that he was going to force Barr to go through with the sale and unless he received the abstract or policy by the following Tuesday, he would file a bill for specific performance. We find no proof in the record showing or tending to show any attempt on the part of Barr to hinder the proper consummation of this transaction, and the record is equally silent as to what, if anything, the complainant did between March or April and the following September to accomplish that result although it is now claimed she had paid out $4000 on the deal. That the documents requested by Sherwin in his letter of September 16, or their equivalent, were promptly furnished, upon Barr receiving that letter, is evidenced by another letter of Sherwin's to Barr acknowledging their receipt and dated a few days later. The record shows that on September 25th the parties met at the office of the Chicago Title & Trust Co. to close this deal and there the tender of the balance claimed by the purchaser to be due, was rejected on the ground that it was $3000. short.

The record does not show when John F. Barr conveyed this property to his son. They denied in their answer that "the xxxxx title of said premises is held by Malcolm E. Barr with intent to cheat and defraud the petitioner or anyone else." In view of all the evidence in this record, if they concluded such a step was advisable to prevent a fraud being perpetrated on John F. Barr, we would consider it a reasonable precaution to take.

In our opinion, the findings and decree of the chancellor are clearly against the manifest weight of the evidence, a large part of which is documentary, and we have the original documents here before us, as previously pointed out. From our inspection of these documents, and for the other reasons we have referred to, we can entertain no reasonable doubt that the signatures of John F. Barr, to the alleged contract dated March 31, and receipt dated April 11, are not genuine signatures, and, in our opinion, he never signed these documents. We are further of the opinion that the evidence clearly shows that the alleged cash payments of $2250 on March 31, and $1500 on April 11, were never made, and that the payment of $750 by check, on the latter date, was made.

For the reasons we have given, the decree of the Circuit Court is reversed and the cause is remanded to that court with directions to dismiss the bill of complaint for want of equity.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS

O'Connor, J. Concurs.

Taylor, J. Specially concurring.

I concur in the conclusion but not in all the reasoning of the majority opinion. The questions of evidence, I think, were properly decided by the Chancellor. However, after a careful examination of all the evidence as it is shown in the record, I am strongly persuaded that it does not in any way sufficiently show that the disputed payments were ever made. They may have been, but considering the conflict in the evidence and particularly the contents and condition of the exhibits, and the many discrepancies casting doubt on the claim of the complainant, and weighing everything carefully, I am impelled irresistably to the conclusion that the decree ought not to be allowed to stand.

348 - 29765.

E. SCHMIDT,

Appellant,

v.

JOHN F. BARR and
MALCOLM E. BARR,

Appellees.

239 I.A. 649

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Friday, Nov.6, 1925.

MR. PRESIDING JUSTICE THOMSON delivered additional opinion of the court, on petition for rehearing.

The complainant has filed a petition for rehearing in which, for the first time, she contends that this court is without jurisdiction to pass on the appeal in this case because "the bill of complaint was predicated upon a contract for the sale of real estate and involves a freehold." That contention is wholly untenable. So far as a freehold is concerned, the jurisdiction of this court to pass on the appeal, does not depend on whether the bill of complaint involved a freehold, nor even on whether the decree from which the appeal was perfected, involved a freehold, but it depends on whether the appeal involves a freehold. Although a freehold may have been involved in the decree appealed from, the appeal should be to this court and not to the Supreme Court, if the questions involved in the assignment of errors and the appeal, do not involve a freehold. Easterlick v. Easterlick, Ill. App. Court, First District; case No. 29761: Opinion filed October 10, 1924, not yet reported; affirmed in 316 Ill. 72; McCarthy v. McCarthy, 282 Ill. 488; Fields v. Coker, 161 Ill. 186;

Copied filed Friday, Nov.6, 1925,

Hutchinson v. Spoehr, 331 Ill. 313; Miller v. Kenail, 333 Ill. 301; Lewis v. Lewis, 337 Ill. 416; Martin v. Small, 354 Ill. 138; Schneider v. McDonald, 365 Ill. 41; Diana v. Fuchs, 303 Ill. 488.

The precise point involved in the appeal in the suit at bar, was presented in the case of Smith v. Gallentin, 171 Ill. 433. In that case, the Supreme Court held that an appeal from a decree requiring specific performance of a contract to convey land upon payment of the amount due, lies to the Appellate Court, where the making of the contract and the right to conveyance are conceded, the only objection being that the decree finds a wrong amount due. In that case the Supreme Court said, "The jurisdiction of this court is to be determined by the questions involved in the appeal, and although a freehold may have been originally involved in the suit and in the decree rendered, yet if no objection is made to the decree so far as it settles the right to conveyance of the freehold upon payment of the amount due, and the only objection is to the settlement by the court of the matters of account, an appeal will not lie from the Circuit Court to this court, but it must be taken to the Appellate Court." The decision of the Supreme Court in Kuhn v. Eppstein, 331 Ill. 314, is to the same effect.

In the cause at bar the defendants have never taken the position that John F. Barr had not agreed to sell the property to the principal of Waits for the consideration claimed. In the answer filed by them, John F. Barr expressly

"admits the encumbrance of $8000 on the premises and avers that they are ready and willing to apply the $1000 on the purchase price of $17,500 and are ready and willing to accept the sum of $8500 and convey the premises by warranty deed to the principal of Mr. Wm. H. Veits **** The question of whether the defendant, John F. Barr had obligated himself to convey the property in question, has never been an issue in this case. He admits he had, although he denied signing the contract dated March 31, wherein he purported to acknowledge that $8500 had then been paid to him on the purchase price. The sole issue in this case in the trial court and on appeal, has nothing to do with the title to ,the property directly, but involves a question of payments, the complainant contending that Barr has been paid $4000 on the purchase price and he contending that he has been paid only $1000. The appeal was properly perfected to this court, and the petition for rehearing is, therefore, denied.

PETITION FOR REHEARING DENIED.

354 - 29771

BEN BERRY, doing business as B. BERRY,

Appellee,

v.

FLANDERS REALTY CO.,

Appellant.

239 I.A. 649

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 28, 1935.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Berry, brought this action in the Municipal Court of Chicago to recover the fair and reasonable value of certain work and labor performed and materials furnished by him in repairing the roof of an apartment building owned by the defendant. The evidence was heard by the court without a jury and the issues were found for the plaintiff and judgment entered in his favor, for $300, to reverse which the defendant has perfected this appeal.

The plaintiff testified that a telephone call was received at his office by his office girl, from the defendant, requesting the plaintiff to go and look at the roof on the building in question and a day or two later another call came in, "for me to go and see the janitor and go up on the roof and find out what was to be done." The court asked the plaintiff just what was said over the telephone upon the occasion of this second call and he answered, "go there and see the janitor, just go there and see the janitor." He said that was all that was said,

to the best of his recollection. He testified further that he went to the building and went up on the roof with the janitor and he told the janitor that the roof should be re-coated, "and he told me to go ahead, because the building had been decorated and they were afraid the decorations would be spoiled if the roof was not repaired."

The record shows that this work was finished on May 31, 1923. The plaintiff sent his bill to the defendant but it was not paid.

On cross-examination the plaintiff was asked whether it was customary to receive orders from a janitor, to go ahead with the work, when an owner has instructed one to go to the building and look at it, and he answered, "It is not customary but it is often done."

One Zimmerman, an employee of the defendant, testified that he was the one who called the plaintiff's office, but did not remember talking with the plaintiff personally, but to his office girl, and that he instructed her to have the plaintiff look at the roof in question and see what was necessary to be done and submit an estimate, and "We told Mr. Berry to go to see the janitor and he will take him on the roof and show him what was necessary." The evidence shows that the defendant received estimates from two other roofing concerns, one offering to do the work for $235.00 and the other for $185.00 and that they let the contract to the latter concern. Zimmerman testified that the day before the work was to start, he and

another employee of the defendant, one Watson, were driving by the building and noticed men working on the roof and they stopped and asked the janitor who was working there and he told them that the plaintiff's men were doing the work. Watson testified that he went on the roof and found the men were the plaintiff's. "The plaintiff was not there and we looked up the janitor and asked him if he had told the plaintiff to gothead with the work, and he said he had not."

Zimmerman testified that when he and Watson got back to the defendant's office, on the day that he saw the plaintiff's men at work on the roof, they tried to reach the plaintiff on the telephone, but he was not in and they left word for him to call back, "but we never heard from him until we received an invoice." The defendant must have received an invoice almost immediately, for Zimmerman testified that the plaintiff was in the defendant's office a few days after the work was done, and he asked the plaintiff who had instructed him to go ahead with the work, and he said the janitor had, and he then asked him if it was customary to get such instructions from the janitor, "and he said he really didn't know, but he thought the janitor told him to go ahead." The record shows that under date of July 5, 1923, a month later, the defendant wrote the plaintiff a letter, saying that they had been trying to get in touch with him "concerning the attached invoice, for the past month, but so far have been unable to do so * * * The amount of this invoice is very unreasonable and we do not intend to settle this account until we get in touch with you. At the time

your men were working on the job, the janitor at the building told us that you said the cost of the job would be a little over one hundred dollars, and we took this for granted and expected an invoice accordingly. However, based on the other estimates we received on the job, we are willing to give you our check for One hundred and fifty dollars in full settlement." This letter was signed by Zimmerman. The plaintiff's invoice was for $300.

What Zimmerman has to say in the letter quoted above, is not at all in line with his testimony. Nothing whatever is said in this letter, to the effect that the defendant is not willing to pay the plaintfff's bill, because he had never been properly authorized to do the work in question. The only complaint which the defendant made at that time, through Zimmerman, was that the bill was too high. Zimmerman testified that a few days after the work was finished, he had a conversation with the plaintiff about the claim of the latter that he had been instructed to do the work by the janitor, and Watson testified that in a talk with the janitor at the time the work was being done, he said he had not authorized the plaintiff to go ahead with the work. But in Zimmerman's letter, he writes the plaintiff that at this very time the janitor had told him that the plaintiff had said that the job would cost a little over One hundred dollars "and we took this for granted and expected an invoice accordingly."

This evidence presents a controverted question of fact, as to just what the instructions, telephoned to the

plaintiff's office,were. According to his evidence, the plaintiff was told "to go and see the janitor and go up on the roof and find out what was to be done." If he was told that, we are of the opinion that the defendant thereby authorized and directed the plaintiff to follow the directions of the janitor, and this would clothe the janitor with sufficient authority to direct the plaintiff to proceed with the work. On the other hand, of course, if the plaintiff was told to go to the building and see the janitor and see what work was necessary, and then submit an estimate, the situation would be different. The court apparently found that the plaintiff's theory was the correct one. The evidence on that point being in conflict, as outlined, we are of the opinion that we are not in a position to say that the court's finding is against the manifest weight of the evidence.

In addition to the letter of July 5, 1923, above referred to, the plaintiff introduced another letter written to him by the defendant and signed by Zimmerman, under date of January 4, 1924, written upon the occasion of the receipt of another bill from the plaintiff, and in this letter Zimmerman refers the plaintiff to his letter of July 5, in which an offer had been made in settlement of the matter, and in this letter of January 4, he takes the position that the plaintiff did this work without receiving an order from the defendant. It is contended that the court erred in receiving these two letters in evidence because they contained offers of a settlement. In our opinion, the letters were admissible, although they did mention a settlement. They showed that a

month after the work was done the defendant was not taking the position that the work had not been ordered, but rather that the bill submitted was too high, and these letters would indicate that not until January of the following year did the defendant take the position that the work was done without authority. There is some testimony by the defendant's witnesses that there was some conversation at the time the work was done or shortly thereafter, about who had directed the plaintiff to do the work, but the first letter referred to refers to a conversation with the janitor to the effect that the latter had told what the plaintiff's charges were to be, and that the defendant had taken it for granted that they would be as then stated.

The defendant also contends that the trial court erred in permitting the plaintiff to testify as to his conversation with the janitor without first having established that the janitor was the duly authorized agent of the defendant. As we have already pointed out, if the directions to the plaintiff, received over the telephone, from the defendant, were as the plaintiff testified they were, a sufficient basis as to the janitor's authority was made out, to warrant the admission of the plaintiff's conversation with him.

Defendant further contends that the plaintiff failed to prove that $300 was the customary and usual charge made for the work done. We are of the opinion that contention is not tenable. Three or four experienced roofers testified on this point for the plaintiff. While they had not seen the roof before the work was done, their testimony shows without question that it was possible for them to observe the extent

of the work and give an estimate of what the usual, customary and reasonable charges were, for it. One of these witnesses stated that such a charge would be $300; another one put it at $350; another put it at $375; and another at somewhere between that figure and $400. That these witnesses were acquaintances and friends of the plaintiff and had examined the roof and had come to testify in his behalf, without subpoena or without being compensated for doing so, would not warrant a disregard of their testimony.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

363 - 29780.

4725

WILLIAM PHOTAKOS,

Appellant,

v.

239 I.A. 650

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

W. E. BRITIGAN, doing business as BRITIGAN'S ONE HUNDRED TWENTY FIRST STREET REALTY TRUST and CHICAGO TITLE AND TRUST COMPANY, a Corporation,

Appellees.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON DELIVERED THE OPINION OF THE COURT.

By this appeal the complainant, Photakos, seeks to reverse a decree of the Circuit Court of Cook County, dismissing his bill of complaint for want of equity. The court having sustained demurrers to the original bill filed by him, as well as to an amended and supplemental bill, he filed a second amended and supplemental bill, in which he alleged that certain agents of the defendant, Britigan, had called upon him at his place of business, seeking to sell him some lots in the William W. Britigan Realty Association's Stewart Ridge Addition; that they had taken him out and shown him the lots, which were inside lots, and he told them he did not desire to purchase them without consulting his attorney; that these agents took the complainant to the

Opinion filed Oct. 28, 1925.

sub-division offices of the defendant Britigan and talked with him further in the matter, telling him that if he would deposit $2,000 on the purchase price of the lots, they would sell them for him in three weeks at a profit; and that, relying upon these representations, and believing them to be true, he gave the agents a check for $2,000, which was later cashed by the defendant Britigan.

It was further alleged by complainant in his second amended and supplemental bill that at the time the agents made their representations about the re-sale of the lots, they knew the property could not be re-sold, "because the contracts of the defendant, William H. Britigan, provided that they would not agree to re-sell the same." Attached to this bill is a copy of the contract which was entered into between the parties, the last paragraph of which states in large type, "IT IS EXPRESSLY UNDERSTOOD BY THE SECOND PARTY THAT THE FIRST PARTY DOES NOT UNDERTAKE OR AGREE TO RESELL FOR THE SECOND PARTY (complainant) THE REAL ESTATE HEREIN DESCRIBED."

Complainant alleges further in his bill that on the day following his $2,000 payment to the agents of the defendant, they again visited him at his place of business, early in the morning, asking him to go to Britigan's office, and that he refused to go until he had consulted with his attorneys; that on account of the early hour he was not able to reach them and defendant's agents stated to complainant that they would drive him down town, and that they did so, taking him to Britigan's office instead of to the office of complainant's attorneys, assuring him that it was not necessary to consult his attorney, as he was dealing with honest people,

but that complainant insisted upon calling his lawyers, but was again unable to reach them. He alleges further that upon reaching Britigan's office the agents told him that if he would deposit $1,800 more on the purchase price of a corner lot, rather than the inside lots, it would be easier to re-sell it and that complainant "would not need to make any further payments as the lot would be sold;" and that he made this additional payment of $1,800, relying upon their representations.

Complainant alleges further that defendant's agents represented that this corner lot was worth more than $17,800, and that because of this value they would be able to make a re-sale within a short time. He further alleges that the agents advised him that he would be given a contract of purchase for the corner lot, and he told them he would submit it to his lawyers for examination, and they assured him that would not be necessary, as everything would be specified in the contract, just as they had represented it to him. The complainant further alleges that these agents "brought him a large paper which they informed him was the contract of purchase," assuring him that it contained everything they had told him; and that relying upon their representations, he signed it without reading it or having it read to him. He also alleges that on the day following his execution of the contract, he took a copy of it to his lawyers, "and it was not until then that he discovered the fraud that had been practiced upon him."

He further alleges that the said agents of the defendant well know that the lot in question was not reasonably worth the sum of $17,500, but that the reasonable value of it was not more than $5,500; and that he demanded the return of his money from the defendant, Britigan, and tendered back his copy of the contract. He further alleges that he was a foreigner, not well versed in the English language, and that his reading knowledge of said language was very slight; all of which the agents of the defendant well knew. He further alleges that the contract is inequitable and void for a number of reasons, which it will not be necessary to set out at length.

When the trial court sustained the general and special demurrer of the defendants to the complainant's amended and supplemental bill, he elected to stand by that bill, whereupon, it was dismissed for want of equity. The complainant contends that the value of the property covered by the contract was greatly exaggerated to him, and that the assertions of value made by the defendant's agents were not mere statements of opinion but were material representations of fact. A mere statement of the case would seem to indicate clearly that this contention is not sound. The complainant apparently received the usual amount of sales talk from these real estate agents, and was taken out to the property and it was exhibited to him, and he could have made any investigation about it he cared to. That he did make some investigation as to the value of the property is intimated in a statement of his counsel's brief, where it is argued that the complainant "without negligence on his part was induced by the acts of the

defendant Britigan's agents, to rely upon material statements which placed the value of the property far in excess of any one of a number of valuations which the complainant received from others."

Another contention made by the complainant is that "the fraud that vitiates this transaction **** consists also in the promise of re-sale." In the first place it is to be noticed that the complainant does not allege in his bill that the defendant, Britigan, made any promise to re-sell through these agents, but, apparently, from the allegations contained in the bill, the defendant's agents in attempting to sell this lot to the complainant, assured him that if he made the purchase they would undertake to re-sell the lot for him as a profit within a specified time. The contract which was entered into specified unmistakably that the buyer understood that there was no agreement on the part of the seller, regarding any re-sale of the property. Even if the promise had been made and if it were not fulfilled, it would not give the complainant the right to charge fraud, and to file a bill for the cancellation of his contract and the return of his money. If there was such a breach of a promise supported by a proper consideration, the complainant might have his action at law for damages, but the breach of promises does not make out a case of fraud such as will support an action in equity for a rescision.

Complainant also "finds fault with the contract" as it is put in the brief filed in his behalf, because it provides that it should not be recorded and should become void if it was, and because the installation of certain improvements was not definitely provided for but was left optional with the seller. These may not be satisfactory

provisions of the contract from the complainant's point of view, but they certainly do not make the contract void. Further complaint is made, because "the contract is signed by a trust," and it is argued " that the contract is not well executed on that account because of the lack of entity of the other contracting party." It is also contended that the contract is void because it fails to comply with the Statute of Frauds, "because the title of the property is in the Chicago Title & Trust Company" and the latter is not one of the parties to the contract. The contract is signed by "Britigan's One Hundred and Twenty-first Street Realty Trust, of which the Chicago Title & Trust Company is trustee, By W. H. Britigan, Manager." The complainant filed his bill against "William H. Britigan, doing business as Britigan's One Hundred and Twenty-first Street Realty Trust," and also against the Chicago Title & Trust Company. According to the position of the complainant himself, in filing his bill, Britigan's One Hundred and Twenty First Street Realty Trust, was Britigan, and complainant's contention that the contract was signed "by a trust and not by any person, either natural or fictitious," comes to naught. Of course, the fact that the title of the property may be in the Chicago Title & Trust Company, as trustee, does not mean that the contract violates the Statute of Frauds.

The demurrer to complainant's second and amended and supplemental bill, was properly sustained. The decree of the Circuit Court is therefore affirmed.

DECREE AFFIRMED.

Taylor, J. and O'Connor J. concur.

382 - 29739

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. BERTHA CURRAY,

Appellee,

v.

STANLEY CASE, JR.,

Appellant.

239 I.A. 650

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1,100, rendered against him in the Municipal Court of Chicago in a bastardy proceeding. The trial in that court was had without a jury.

In support of the appeal it is contended that the finding of the trial court, that the defendant was the father of the child of the relatrix, is against the manifest weight of the evidence. The relatrix testified that the defendant had sexual intercourse with her on only one occasion, and that was on September 25, 1923. The defendant admits that he had intercourse with the relatrix at or about that time. The relatrix further testified that she never had intercourse with any man other than the defendant. In February, 1924, she had a talk with the defendant about her condition, and he then took her to see his doctor whose name was Corbett. Dr. Corbett testified that when he examined her at that time, "she was about six months pregnant;" that during the time he

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treated her, the defendant was present; that "he wanted to see whether she was pregnant or not." On cross-examination Dr. Corbett testified that when he examined the relatrix she was suffering from chronic gonorrhoea, and that he treated her for that trouble; that "this condition had existed for a long time, - say possibly a year," and that the only treatment he gave the relatrix was for the gonorrhoeal condition, and that he treated her three or four times.

It appears that the relatrix later went to a Dr. Jacobsen and consulted him. He was called as a witness for the People and testified that the relatrix came to him in March, 1934, saying that Dr. Corbett had told her that she had gonorrhoea and she "asked me to corroborate the finding if possible." He then testified that he made a total of six microscopic examinations, all of which were negative, - showing no traces of gonorrhoea. He also testified that there were certain objective symptoms of this disease, such as inflammation. On cross-examination he stated that he found an inflamed condition present when he examined the relatrix which was not natural but that it might be due to any one of several conditions, - it might be a gonorrhoeal infection, or it might be due to something else. He testified also that it was quite unlikely in a case of gonorrhoea of a year's standing, that you would find gonorrhoeal germs, but he stated that it was quite possible that there could be a case of gonorrhoea and a laboratory test would not show it. This doctor attended the relatrix when her child was born on May 31, 1934. He testified that the child was entirely normal at birth. He was asked when he would say the period of conception was, allowing for the natural period of gestation, and he answered that it would

be about the middle of August. He also testified that the average period of gestation is 280 days, but that it ranges from 240 to 320.

Dr. Corbett testified that a child born less than 270 days after conception, would show marks indicating that the birth was premature. A period of 248 days elapsed between September 25, 1923 and May 31, 1924.

In February, 1924, the relatrix was living with a friend of her's whose name was Ivo. The defendant testified that in February, 1924, "Some woman called up the office and talked to my father and left a number for me to call. I called up and she gave an address and I went out there." The place which the defendant visited at this time was the home of Mrs. Ivo. She testified that when the defendant called at her home, on this occasion, she asked him if he knew the condition the relatrix was in and that he replied that he knew and that he was the cause of it, and said "he would take her to a doctor and see what he could do." The husband of the last witness testified that he saw the defendant in his home twice and that he overheard him say that "he was the fault of Bertha Curray being in the condition that she was in at that time."

The defendant introduced in evidence an affidavit, dated May 12, 1924, which the relatrix admitted she signed, but she testified that she just signed it, - "there was no notary public there." This affidavit was to the effect that the relatrix was the complainant in the bastardy proceeding and also the plaintiff in a breach of promise suit which had been

filed against Case and that "At the present time I am in a delicate condition, but I state the fact to be that Stanley Case, Jr., did not cause nor is he in any way responsible for my being pregnant, and I further state that Stanley Case, Jr., did not promise to marry me and that I have never requested him to do the same." The affidavit further is to the effect that the relatrix had begun these two suits upon the demand of "several of my supposed friends and were not done by me voluntarily, and it is now and has been my desire to cause both of said cases to be dismissed."

One Charles H. Borden, a lawyer, testified that he originally represented the defendant in this case; that he talked to the relatrix in his office, in May, 1934, in the defendant's presence, and that upon that occasion he told her that he expected to represent the defendant at the trial of the bastardy case, and he thought it was only fair to tell her that an investigation had been made concerning her past and that she might rest assured they knew things that she had been doing, and because of this her cross-examination might prove embarrassing; that he then asked her if she felt about the case as she did when she started it and she said she did not; that he then asked her "Are you willing to say that Stanley Case is not responsible for your condition?" and she said she was, and that he then asked her if she would put it in writing, and she said she would, and he then prepared her affidavit and she signed it. He also testified that she said she did not want to confer with the State's attorney or with the lawyer who had represented her in the breach of promise case. He testified that no promise

was made by the defendant to the relatrix at the time this statement was made. The relatrix testified, as to this statement, that the defendant had begged her to "release him"; that he said he would lose his position if he got into any more trouble, so she told him she would go down the next day, as he had asked her to; that he promised to give her "so much a week;" that he asked her how much she could get along with and she said $10.00 a week, and he said he would give her that, - "that was reasonable." It seems that he was going out to the Pacific coast and that he did go out there two or three months later, and was married out there and brought his wife back to Chicago with him. The relatrix testified that at the time she signed this statement he said he was going out to Washington and after he came back he would look after her and get an apartment for her; that she would not be able to work for two months anyway and he would see that she got along all right, whereupon, she went to his lawyer's office with him and the lawyer said the only thing she could do to release him was "to sign that paper." She also testified that the lawyer told her that if she would sign the statement, the defendant would take care of her, explaining that "Stanley would rather give it to me than to the lawyers."

In addition to the testimony already referred to, the defendant testified that he told the relatrix, in May, that his lawyers knew all about her "and what kind of a fight it was going to be, and finally she decided she would quit." He testified that he gave her a few dollars at that time, because she had nothing to eat and he felt sorry for her, and the next day she went down to the lawyer's office

'and he (the lawyer) told her just as he related here." He testified that he thought he gave her five or ten dollars after that; that he then went to Seattle, and that she sent him several letters out there and "in one of them she told me that Marie Nelson's husband was to blame for her condition." He also testified that at the time she signed the paper in Mr. Borden's office, he made her no promises.

It appears that shortly after the defendant returned from the west, with the girl he had married out there, she and the relatrix had some conversation. There was some testimony about that by the defendant's wife and also by the relatrix but nothing of importance is contained in the testimony about that conversation. The defendant called one Harper, as a witness, who testified that in February or March 1924, the relatrix came to the house in which he was living, with a man named Higgins; that she said she wanted to see Higgins but that he told her Higgins was not there, but he presumed he would be back anytime and he asked her to wait, and she remained half or three quarters of an hour. He further testified that they discussed common place things; that he told her that if she saw much of Higgins or he helped her to any extent, she "would have to pay for it in other ways." He then testified, "I gave her a sum of money to keep her away from him because she convinced me - - -" Here an objection was interposed and sustained. The witness was then asked to state what else happened in the room and he said, "as she was ready to leave the room I asked her for a kiss and she gave it and laid down on the bed, and, of course, nothing happened, - just fooling around."

A motion was made to strike that out and the court struck it out.

We are unable to say on this record that the finding of the trial court is against the manifest weight of the evidence. That the defendant had sexual intercourse with the relatrix is admitted. She testified that she never had intercourse with anyone else, and there is no proof in the record to the contrary. Our attention is called to the testimony of the witness Harper, and counsel for the defendant says in the brief filed in his behalf, that this witness testified to intimate relations with the relatrix in March, 1934. It is contended that the trial court erred in striking out certain of the testimony given by this witness, because it was admissible, tending to impeach the relatrix, who testified that she had never had intercourse with anyone else. It will be seen from what we have stated as to the testimony of this witness, that he did not testify that he had intimate relations with the relatrix. In fact, he testified to the contrary.

In contending that the court's finding was against the manifest weight of the evidence, counsel points to "the undisputed fact that Bertha Curray had contracted gonorrhoea prior to her relations with Stanley Case." The record would hardly seem to justify reference to the gonorrhoea as an undisputed fact. Dr. Jacobsen testified that he could find no evidence of gonorrhoea; that there was some inflammation present and that while such inflammation might be caused by that disease, it also might be caused by a number

of other things. The "sworn confession" of the relatrix that the defendant was not the father of her child is also urged upon our attention in this connection. The circumstances surrounding the execution of that document, in view of all the evidence in the record, makes us somewhat doubtful of defendant's view. We are also reminded of the "unsworn statement of Hertha Curray, that the husband of Marie Nelson is the father of her child." The only basis for that is the testimony of the defendant to the effect that such a statement was contained in a letter the relatrix had written to him. For some reason that testimony was not objected to. The letter was not offered in evidence, nor was any explanation made of the fact that it was not produced. It is true that if the defendant is the father of this child, the period of gestation was only 248 days, and that is less than normal, although one of the doctors stated that the period runs from 240 to 320, but the average is 280 days.

There are many things about the testimony given by a number of the witnesses in this case, which would make it exceedingly helpful if the one who was to weigh the testimony and value it, could see the witnesses and observe them while they were testifying. This the trial judge was able to do, and after occupying that position of advantage, and coming to the conclusion that the preponderance of the evidence was such as showed that the defendant was the father of this child, we are of the opinion that we cannot say that such finding is against the manifest weight of the evidence.

It is further contended that the trial court erred in refusing to permit the cross-examination of the relatrix "as to her knowledge, source and history of her gonorrhoeal infection." The only question in the record in connection with the cross-examination of the relatrix on that subject was, "Did you know at the time you went to see Dr. Corbett that you were suffering from gonorrhoea?" She answered, "No Sir, I did not." Objection was then interposed and, after some argument, was sustained. In our opinion, that question was objectionable. No further questions were asked by counsel on this subject.

Complaint is also made of the fact that the judgment which was entered by the trial court on August 6, 1924, requiring the defendant to pay to the clerk of the court, for the support, maintenance and education of the child of the relatrix, $1100.00, and made that sum payable, $200 for the first year after the date of the birth of said child and the sum of $100 yearly for each of the succeeding nine years, and provided that this money be paid to the clerk in equal quarterly installments "the first installment due and payable on May 31, 1924, and each succeeding installment being due and payable on the same day of the succeeding third month, until the total sum of all the moneys shall be fully paid." The statute merely provides that if the defendant, in a bastardy case is found guilty, "he shall be condemned by the order and judgment of the court to pay a sum of money not exceeding two hundred dollars, for the first year after the birth of such child, and a sum not exceeding one hundred dollars

yearly for nine years succeeding said first year." (Cahill's Illinois Statutes, Chap. 17, Sec. 8.) In our opinion the judgment entered by the court in the case at bar is within that statute. The court might properly specify the amounts called for under the statute each year to be paid in quarterly installments, and the fact that the first installment was made payable on the date of the birth of the child, even if that preceded the date of the judgment, does not vitiate the judgment. Kelly v. The People, 29 Ill. 287.

For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

4724a

497 - 23014

LOUIS GREENBERG,

Appellant,

v.

BRIGGS & TURIVAS,

Appellee.

239 I.A. 650

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant Greenberg filed a bill in equity in the Circuit Court of Cook County, demanding an accounting by the defendant, Briggs & Turivas, covering certain transactions involving the purchase and sale of some steel from the United States Government. These transactions were carried through by Briggs & Turivas, and the complainant claimed an interest in them.

In his original bill of complaint, complainant did not allege a specific agreement between him and the defendant, but alleged that he had been associated with the defendant previously for several years in various enterprises wherein complainant had purchased certain stocks of metals of various kinds from different parties, for the defendant and himself, jointly, under a general agreement whereby the profits resulting from the transactions were divided between them in the proportion of two-thirds to the defendant and one-third to the complainant. A demurrer being sustained to this bill, the complainant filed an amended bill wherein he alleged his

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prior association with the defendant, in various transactions, as set forth in the original bill, but as to the sharing of profits by the parties, the allegations in this amended bill were that the agreement they had was to the effect that after the material purchased had been disposed of and the profits determined, the defendant would pay the complainant whatever share of the profits the parties would then agree upon, and that pursuant to that arrangement the defendant promised and agreed to pay the complainant for his services in securing the contracts here involved, a sum equal to one-third of the profits resulting from the purchases and sale of the materials contracted for. A demurrer being likewise sustained to this amended bill, the complainant filed a second amended bill of complaint, which was the bill on which issue was joined. In this second amended bill, the complainant alleged that, at the defendant's request, he had purchased from the United States Government, for and in behalf of the defendant, 100,000 tons of shell steel, in 1918, and in the following year he had likewise purchased approximately 35,000 tons of steel billets from one Schwartzenberg, of Cleveland, Ohio. He further alleged the defendant promised and agreed to pay him for his services in these transactions, a sum equal to one-third of the profits resulting therefrom; that the defendant had sold all the material bought in connection with these transactions at large profits, that the accounts involved were complicated and that the expenses incurred and profits received could only be ascertained from an examination of the defendant's books; that he had demanded an accounting from the defendant, which had been refused; that the defendant had paid the complainant, in connection with the transactions involved, certain sums aggre-

gating $33,540.63 and that if defendant were required to render an accounting, there would be found to be due the complainant approximately $100,000.00. These successive bills filed by the complainant were all sworn to by him.

The proof shows that under date of October 31, 1918, the defendant entered into a written contract with the United States Government, through a duly authorized officer of the contract section of the Ordinance Department, acting under the Secretary of War, for the purchase of 30,000 tons of steel shells, forgings and slugs, at $24.05 per ton, f.o.b. Pittsburgh. Under date of November 4, 1918, the defendant entered into a similar contract with the Government for the purchase of approximately 80,000 tons of similar material at $24.50 per ton, f.o.b. Pittsburgh. On November 27, 1918, the Government offered for sale at auction, approximately 96,000 tons of steel billets, 15,500 tons of which were located in Chicago and in St. Louis. The defendant was a bidder at that sale, but a higher bid was submitted by M. A. Schwartzenberg of Cleveland, and the Government closed a contract with him for the sale of these billets. It developed that Schwartzenberg was not able to carry out this purchase. That the complainant was employed by the defendant to make investigations in Washington and locate surplus materials which were to be sold by the Government and that he performed some service in connection with the contracts entered into by it with the Government, and also in connection with the sale of the billets which were the subject of the Schwartzenberg contract, is conceded but the parties differ as to what the terms of that employment were.

When it became apparent that Schwartzenberg was not going to be able to carry out the contract he entered into with the Government, the proof shows that the defendant undertook to get an assignment of that contract. The defendant also negotiated with Schwartzenberg for the purchase from him of the 15,500 tons of billets located in Chicago and St. Louis. An arrangement was finally entered into by the defendant with Schwartzenberg, for the sale of the billets last referred to and the remaining 55,000 tons of the billets contracted for by Schwartzenberg, were handled by a newly organized corporation, called the Merchant's Metals Corporation (under an assignment from the Government and Schwartzenberg) the stock of which was held by the defendant Briggs & Turivas and three other parties, named Friederberg, Hittner and Eickley. The defendant claims that it became necessary to handle the Schwartzenberg billets in this way because the complainant insisted in bringing in the three outside parties above named and giving them a share in the deal and threatened to block the carrying out of the assignment, if this were not done. The complainant, on the other hand, claims that this new corporation was formed at the instance of the defendant.

The complainant testified that before he went to work for the defendant on these various deals, he came to a specific agreement with them as to the compensation he was to receive, and that Briggs, the president of the defendant corporation, agreed to pay him one-third of the profits to be realized from the purchase and sale of the material involved, including the 15,500 tons of steel billets, handled by the defendant under the Schwartzenberg contract and that when the Merchant's Metals Corporation was organized it was agreed that he was to receive

one-third of the profits derived through the stock in that Corporation, held by the defendant. The only proof that any such agreement existed between the parties is to be found in the testimony of the complainant himself. The defendant's proof shows that before the complainant was employed by it, he wrote a letter to Turivas, the defendant's vice-president, seeking a connection with the defendant, in which he said "I would like to have a drawing account of $200 weekly and I would leave the question of profit sharing to yours and Mr. Briggs' judgment." Subsequently the complainant had a conference with Briggs and the latter testified that he then engaged the complainant for the purpose of keeping the defendant informed as to the sale of materials such as the defendant dealt in and he agreed to advance the complainant $1000 a month as a drawing account, to be charged to him and accounted for on any compensation that might thereafter be given him and that the matter of his additional compensation on such deals as he might be helpful in making would have to be left entirely to Briggs and that the defendant accepted this arrangement.

In order to make out his case, and show that he was entitled to an accounting, it was incumbent on the complainant to prove by a preponderance of the evidence that he had a contract with the defendant substantially as alleged by him in his second amended bill of complaint. The Master found that the complainant failed to prove his case but that the arrangement between the parties was that contended for by the defendant, and made out by its evidence. The Master's report to that effect was approved by the Chancellor and a

decree was accordingly entered dismissing the complainant's bill for want of equity. In seeking a reversal of that decree by this appeal, the only contention urged by the complainant is that the decree is against the manifest weight of the evidence.

In our opinion the point made by the complainant in support of his appeal, is without merit. His own letter is contrary to that contention and supports that of the defendant. While that letter was written before the parties entered into their agreement, it shows that the complainant was both willing and anxious to make just the kind of an agreement with the defendant which the witnesses for the defendant testified he did make. The letter is not merely a feeler, as the complainant now contends. It does not seek to bring out an offer from the defendant. In that letter the complainant suggests that they "make some arrangement whereby I would be permanently connected with you." He goes on to say that his desire to make a connection with the defendant is not so much a matter of the money he might make but that his "real desire is to make good." Finallly he says that if the idea he suggests of his becoming connected with the defendant meets with the approval of the latter, he would like a drawing account of $300 a week and "I would leave the question of profit sharing to yours (Turivas) and Mr. Briggs' judgment."

It is apparent from the references heretofore made to the various pleadings filed by the complainant, all of which were sworn to by him, that some of them are not at all in conformity with the testimony given by the complainant before the

Master in this case. As to his claim that under his agreement with the defendant, he was to have an interest in the profits derived from the handling of the steel billets taken over from Schwartzenberg by the Merchant's Metals Corporation, represented by one third of the stock in that corporation held by the defendant, the defendant introduced in evidence a sworn answer and counterclaim filed by the complainant in a case instituted against him in New York by the Merchant's Metals Corporation, in which he claimed that the corporation agreed to issue 10 per cent of its capital stock to him and to account for and pay over to him 10 per cent of the net profits derived "as the result of the disposal of certain steel billets," the contract for which was procured from the Government through the efforts of Greenberg.

The defendant also introduced in evidence one of the books of account of the Lake Railway Supply Company, a name under which the complainant sometimes did business, in which, under date of December 31, 1920, appeared certain items of debit and credit,as follows:

"Briggs & Turivas,	B 9	$23,810.41	
L. Greenberg	1 43	4,800.00	
Freight, Switching & Demurrage	g.3	22.63	
Commission	C 5		28,033.04."

These lines were enclosed in a bracket, opposite which was written "To adjust Briggs & Turivas acct." This would indicate that according to complainant's own books his account with the defendant was then closed.

One of the representatives of the Government in the transactions which were entered into by the defendant, being

the contracts involved in this case, was one Captain Martin. The contracts he negotiated for the Government, with the defendant, or in which the defendant acquired an interest, were made late in 1919 and early in 1920. The proof shows that Captain Martin was a witness in this case for the defendant and, at the time he testified, (February 1922) he had severed his relations with the Government and was in the employ of the defendant as its Eastern representative. He left the government service December 1, 1920 and shortly thereafter, became an employee of the defendant. This witness testified that for twenty years before the world war, he had been connected with the Maryland Steel Company as general superintendent. He entered the Government service in December 1917, acting in a civilian capacity as an inspector of steel in the various plants in which steel was being manufactured for the Government. He had been in the steel business practically all of his life. In looking up surplus material being sold by the Government, the complainant had occasion to confer with Martin a good many times. His testimony is wholly at variance with that of Martin as to what was said and done in connection with those conferences. The complainant, in attacking Martin's testimony, urges his bias in defendant's favor, as shown by his leaving the Government service and entering defendant's employ, in which he was at the time he testified. This witness continued his connection with the Government for nearly a year after these contracts were negotiated. It was to be expected that, the war being over, Martin would return to business of the kind in which he had been engaged all his life, which was iron and steel.

The defendant is, according to the evidence, a very large dealer in those materials. The fact that Martin became connected with the defendant does not make him unworthy of belief. Apparently the plaintiff urged this point in attacking Martin's testimony before the Master, for in his report, the Master specifically refers to the matter and says that "the manner of this witness was open and straight-forward and in the Master's opinion his testimony is entitled to full credence."

The complainant also had conferences with Briggs and Turivas, in connection with the matters involved in this case, some with one, some with the other and some with both of them. His testimony as to the substance of what was said or agreed to in these conferences, was likewise at complete variance with their testimony. It would serve no purpose to analyze the differences in their testimony here.

The complainant had several talks with Albert L. Hopkins, one of the attorneys for the defendant, prior to the filing of his bill of complaint in this case. One of them was had in the presence of Earl J. Smith, who was connected with Mr. Hopkin's office. Complainant's testimony is likewise completely at variance with theirs as to what was said in these conferences. In one of them, Hopkins testified that the complainant said the defendant owed him money "in connection with this steel shell contract that I helped them get;" that he (Hopkins) then asked him what defendant was to pay him and the latter replied, "Well, I want a third; a third of the profits;" that he

then asked complainant if the defendant had agreed to pay him a third and he said, "No;" that he then asked what defendant had agreed to pay him and he answered "Well, they offered to give me 20 per cent and I would not take it;" that he then asked complainant what defendant had agreed to and whether he had any agreement with the defendant as to compensation, and he answered, "No, Carl (Briggs) just said 'Louis, I will take care of you.'" Smith testified to the same effect. Complainant denied that any such conversation was had. If complainant told the truth in giving his testimony, Briggs, Turivas, Martin, Hopkins and Smith all committed perjury. It is not surprising that the Master and the Chancellor believed that they had not.

In the argument presented in behalf of the complainant, much is made of the fact that the defendant's books show that in connection with some items, he was credited with one-third of the profits which were made. It is contended that this shows there was an agreement on the part of the defendant to make such a division of profits. In our opinion that does not follow. It is just as consistent with the defendant's contention as to what the agreement was, as with complainant's contention. Briggs testified that he did credit complainant with one third of the profits derived from the sale of the Schwartzenberg billets in Chicago and St. Louis amounting to approximately 15,500 tons. The books of the defendant showed other credits to the complainant, apparently not based on a basis of one-third of theprofits.

In our opinion the decree appealed from was fully warranted by the evidence in the record and, therefore, it is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

156 - 29572

FEDERAL COAL COMPANY,
a corporation,
Appellee,

v.

PEERLESS COAL COMPANY,
Appellant.

239 I.A. 650

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover $12,049.35 alleged to be due it on account of the defendant failing to pay for coal which the plaintiff sold and delivered to defendant for which there was a balance due of $8849.35; $3200.00 was claimed to be due plaintiff for damages occasioned by the failure of the defendant to receive and pay for other coal which plaintiff had sold to defendant. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for the $8849.35. The court found in favor of the defendant on the $3200.00 item.

Plaintiff in its statement of claim alleged in substance that during July, 1922, it had sold some 68 cars of coal to the defendant at certain specified prices; that the coal had been delivered, partial payments made and that there was a balance due of $8849.35. It was further alleged that at a later date plaintiff sold some 25 cars of coal to the defendant at $9.00 per ton to be shipped at the rate of

two to ten cars per day, part of which had been delivered when the defendant wrongfully refused to receive the balance, and that plaintiff was damaged thereby in the amount of $3300.00. The defendant filed an affidavit of merits in which it denied that it had purchased the 68 cars of coal in July, 1928, but averred that plaintiff had shipped to defendant 68 cars of coal on consignment. The agreement being that the defendant was to sell the coal at the best prices obtainable and that any profits obtained over and above what the plaintiff had paid for the coal which it had bought from the mines, should be divided equally between plaintiff and defendant; that the defendant had sold the coal at the best prices obtainable and had remitted the proceeds to plaintiff; that the prices obtained by the defendant for the coal were less in amount than plaintiff had paid the mines for the coal and, therefore, there was no profit. As to the second item of $3300.00, the defendant in its affidavit of merits admitted the making of the contract for the purchase of this coal; that four cars were delivered but that it was not of the quality purchased and that plaintiff had not delivered the coal within the time specified in the contract and, therefore, the defendant refused to accept any more of the coal.

1. As to the first item the controversy between the parties was and is whether there was a sale or consignment of the coal. Plaintiff offered evidence tending to show that there was an outright sale and the evidence of the defendant tended to show that the coal was shipped to it on consignment. It might here be noted that although plaintiff's statement of claim was that it had sold the coal at certain specified

prices per ton to the defendant, its evidence went further and was to the effect that it had sold the coal to the defendant at the prices which plaintiff had paid for the coal at the mines, plus one-half the profits in excess of the cost price paid at the mine.

Counsel for the defendant in their brief state that the defendant relies, for reversal, solely on the ground that the finding and judgment were against the weight of the evidence and that the plaintiff failed to prove its case by a preponderance of the evidence. The question of preponderance of the evidence does not arise at all in this court and we are not authorized under the law to disturb a finding and judgment such as the one before us, unless we are of the opinion that they are against the manifest weight of the evidence. Mills & Co. v. Duke, 232 Ill. App. 277. And in this connection the defendant argues that since a witness for the plaintiff gave testimony to the effect that the coal was sold to the defendant, while this version of the transaction was denied in toto by a witness for the defendant, his testimony being to the effect that the coal was shipped on consignment, and the testimony of these two witnesses being the only evidence as to the terms of the contract, and they being equally credible, plaintiff did not prove its case by a preponderance of the evidence. In support of this, the cases of Northern Trust Co. v. Parker, 205 Ill. App. 450 and Miller v. Lerner, 205 Ill. App. 590 are cited. We have a number of times passed on this contention and held it unsound.

In Simpson v. Foreman, Ill. App. Ct.; First Dist. No. 29134, we said: "Defendant

further contends that plaintiff did not prove his case by a preponderance of the evidence, because plaintiff testified that he made his agreement with the defendant over the telephone and the defendant flatly denied that he talked with plaintiff in regard to the matter at all. This question * * * has been frequently considered by this court, and we have in numerous cases held that the question of the preponderance of the evidence does not arise at all in this court, that such question is for the trial court, and if the trial court, where the case is tried without a jury, is of the opinion that the evidence is, at most, but evenly balanced, the plaintiff cannot recover; but, where the court has heard the witnesses testify and observed their demeanor on the stand and has entered judgment in favor of the plaintiff where his case is made out by his own testimony and denied by the testimony of the defendant, then this court cannot disturb the finding, unless we are able to say that it is manifestly against the weight of the evidence. This court can never say, where a certain set of facts is testified to by the plaintiff and these facts are denied in toto by the defendant under oath, and there is nothing else in the record, that these witnesses are "equally credible" by a mere reading of the printed page. That question can only be determined by the trial judge or the jury in whose ocular presence the witnesses appear and testify. Unfortunately, however, there are cases which tend to support the defendant's position where the opinions were written by other divisions of this court, and there are some dicta in a few cases of the Supreme Court to the same effect, but in our opinion there can be no question,

but that the rule stated above is the correct one. First State Bank of Plano v. Isaacs, 221 Ill. App. 658; Hately v. Kiser, 6 Ill. App. 208; Sears Roebuck & Co. v. Sears Slayton Co., 236 Ill. App.287; West Chicago R. R. Co. v. Liesenovitz, 197 Ill. 607; Libby, McNeill & Libby v. Cook, 222 Ill. 206."

In the Duke case supra, in considering this question we said, (p.279): "And he argued that in such case the law is that, there being merely sworn affirmation of one party and the sworn denial of the other, both having equal means of information and both being unimpeached, and each testifying to a state of facts equally probable, plaintiff cannot recover. In support of this the case of Peaslee v. Glass, 61 Ill. 95 and Nancey v. Page, 213 Ill. App. 650, are cited. It never was the law in this State that if upon consideration of all the evidence in the record by a court of review, that, should that court be of the opinion that the evidence was evenly balanced, the plaintiff could not recover and judgment should be set aside (citing cases). Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. The question of the preponderance of the evidence does not arise at all in this court. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and

a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review. This being the law, of course, we cannot disturb the verdict of the jury in the instant case.

"Even in a criminal case where the law requires proof of the defendant's guilt beyond a reasonable doubt a judgment of conviction will not be reversed merely because only the complaining witness testifies to the commission of the crime and he is contradicted by the defendant. People v. Greenberg, 302 Ill. 566; People v. Bostcher, 298 Ill. 580; People v. Maciejewski, 294 Ill. 380."

In the case of Buck v. Morris, 234 Ill. App. (See Duke case supra) another division of this court in considering this question said: "The principal contention of counsel for the defendant is that the plaintiff has filed to prove his case by a preponderance of the evidence. Counsel for the defendant maintain that the rule is well established that where there are only two witnesses, and the statement of one witness is met by a categorical denial by the other witness, and both witnesses are of equal credibility, the plaintiff has not proved his case by a preponderance of the evidence. * * * Ordinarily the finding of a trial court upon questions of disputed fact will not be reversed unless the finding is clearly contrary to the weight of the evidence. Lyons v. Stroud, 257 Ill. 350, 353; Hulbert v. City of Chicago, 313 Ill. 452, 456 * * *." The court then referred to a number of authorities on this question, held the contention is unsound and said: "Even where there are only two witnesses,

and their testimony is directly contradictory and there is nothing inherently improbable in the testimony of either, it is difficult to understand how a reviewing court, which does not see the witnesses nor hear them testify, could reasonably say that both are equally credible." And the court there further said that counsel for defendant had cited the cases of the Northern Trust Co. v. Parker, 205 Ill. App. 450 and Sullivan v. Andres, 205 Ill. App. 590 in support of their contention that a party holding the affirmative of a proposition does not maintain it by a preponderance of the evidence, where there are only two witnesses, both equally credible, who contradict each other and added: "We do not approve of the holdings in those cases."

We have quoted at considerable length from the authorities on this question, in the hope that it will not again be advanced in this court. The contention is clearly unsound and was never announced as the law in this state.

There is another legal proposition that we ought to dispose of at this time. It is advanced by counsel for plaintiff and is "That findings of a trial court, upon conflicting evidence, will not be disturbed, nor its judgment reversed, where there is any evidence to sustain it." And again "The sole question raised by defendant's assignment of error is whether, viewing the record most favorably to plaintiff there is any evidence to sustain the judgment; if there is, the findings of the trial court will not be disturbed." And counsel for the defendant in their reply brief accept this as the law, but claim that it is not

applicable to the instant case, because "there is no evidence to sustain the findings of the court below considering plaintiff's testimony alone; and when we say 'considering plaintiff's testimony alone' we mean considering the documentary evidence over the signature of plaintiff." The proposition of law advanced by plaintiff, although acquiesced in by counsel for the defendant, is not the law in this state. It is the duty of this court under the law to weigh the evidence and, if we are of the opinion that the finding or verdict is against the manifest weight of the evidence, we must set aside the judgment based on such finding or verdict. Donelson v. East St. Louis Ry. Co., 335 Ill. 635; Lyons v. Stroud, supra; Hulbert v. City of Chicago, supra.

We have made a careful examination of all the evidence in the record disregarding the abstract of record and are of the opinion that there is some evidence to sustain plaintiff's contention that the coal was sold and not consigned, but we are also of the opinion that the finding of the learned trial judge in favor of plaintiff's contention is against the manifest weight of the evidence. The evidence shows that the contract in question was made by long distance telephone between Paul Winn, representing plaintiff and who was at Louisville Ky., and E. J. Suffel, who was at Indianapolis, Ind., and representing the defendant. Winn's testimony was to the effect that the coal in question would be purchased by plaintiff from the mine owners at the mine, transported by railroad to the defendant, for which the latter agreed to pay plaintiff the cost price of the coal and to sell the coal at the best prices obtainable and to divide the

profits equally, while the testimony of Suffel was that plaintiff was to buy the coal at the mines, transport it by railroad to the defendant and the latter was to sell it at the best prices obtainable and, if there were any profits, they were to be divided equally. The evidence further shows that the coal cost plaintiffs at the mines $36,151.90; that it received from the defendant, after the latter had sold the coal, a total of $27,302.55, leaving a balance of $8849.35. It, therefore, appears without dispute, that the coal was not sold for as much as plaintiff paid for it at the mines so that there were no profits to be divided. If the only evidence in the record as to what the agreement was, was the testimony of Wimand Suffel, as to what was said over the long distance telephone, we would not be warranted in disturbing the finding of the court in favor of plaintiff, but there is considerable evidence in the record that cannot be explained upon any reasonable theory except that the coal was consigned to the defendant and not sold.

The evidence discloses that plaintiff and defendant had been dealing with each other prior to the transaction in question; that coal was shipped from time to time to the defendant at Indianapolis and that bills of lading and invoices were sent to the defendant. One of the invoices, dated July 27, 1923, sets forth a number of tons, the price per ton and the total, and it is stated that the plaintiff "sold to" defendant the items mentioned. It is stated "The above price on this coal is what it cost us." Other invoices dated August 4, August 7th, August 17th, state that plaintiff

has "bought for" defendant certain coal mentioned. The invoice of July 27th does not state the terms of the transaction. The others have printed at the top "terms - cash upon receipt of invoice." Winn testified that from time to time he called up Suffel and asked for some money in payment of the coal which he stated was sold for cash and that Suffel agreed that the defendant would make remittances from time to time; that afterwards Suffel in a conversation with the witness stated that the defendant was "up against it on this coal" and wanted to know if plaintiff would stand a part of the loss, if there should be any. To which the witness replied that plaintiff would not stand any loss; that about the 19th of September, Winn and Suffel went to Chattanooga to take the matter up with a representative of plaintiff and that they there met and conferred with defendant's representatives, Chrosniak and Thompson. The evidence further shows that, at that time, Thompson told Suffel that the defendant must pay for the coal and that plaintiff would stand no part of the loss; that after some further conversation, it was agreed that the loss, which was about $11,000.00 should be paid by Suffel individually and to evidence this matter, Suffel prepared eleven promissory notes of $1,000.00 each, one due each month payable to plaintiff which he executed and delivered. This was September 16th, 1932. Suffel asked that plaintiff give something in writing, to show the agreement, which was done. Thompson prepared a document in duplicate, one copy of which was signed by him and one by Suffel. This document is in the record and recites that in July, 1932, approximately 73 cars of coal were shipped by plaintiff to defendant at Indianapolis "by virtue of arrangement

between Mr. Paul Winn, representing the Federal Coal Company and Mr. E. J. Suffel, representing Peerless Coal Company"; that it was thought that the coal would sell so as to net a good profit above the cost and it was the understanding that the profits should be equally divided between plaintiff and defendant; that on account of the market conditions the coal was sold by defendant at a loss of approximately $11,784.70; that the coal was bought by plaintiffs and paid for by them, the price being more than $36,000.00; that"Mr. E. J. Suffel, for personal reasons has desired to assume the loss incurred and has today executed notes for $1,000.00 each, payable one each month, the first one payable November 8, 1922. * * * * * * *

"Payment of these notes will close the transaction and release Mr. Suffel and Peerless Coal Company from any liability whatsoever on account of the seventy-three cars of coal shipped. It is understood that the notes above mentioned are not to draw interest and are to be payable only for principal amount at maturity."

Afterwards Suffel paid the first note of $1,000.00 and testified that one of the reasons why he executed the notes, was that he was to sell coal for plaintiff and in an "enlarged territory" and the evidence further shows that about the time Suffel paid the first note, plaintiff disposed of its mines so that Suffel was unable to continue to sell coal for it and apparently he afterwards refused to pay any of the remaining notes, and after considerable negotiation between plaintiff and defendant,- the defendant having refused to pay the balance, this suit was brought.

The evidence further shows that, on July 22, 1922, Winn, representing plaintiff, wrote the defendant at Indianapolis, the letter being received by Suffel, "As per our telephone conversation today, we are shipping you fifteen cars of Hazard Mine Run coal for which we have paid (cash) $10.00 per ton. Please handle to the best advantage possible and advise us accordingly." Winn wrote another letter, two days later, notifying defendant that they had shipped certain cars of coal, the letter appears to have been typewritten and at the end, written in ink, apparently by Winn, appears the following: "As per our wire to you of even date, this coal cost us $10.25. Please handle for cash and advise us promptly." The above quotation is inconsistent with the theory that the coal had been sold and not consigned. On July 24th plaintiff wired the defendant, we are today shipping you forty-three cars high grade West Virginia Mine Run Coal which cost us $10.25." On August 30, 1922, plaintiff wrote defendant and after referring to the coal in question, said: "In the first place there is an open account of over five thousand dollars, covering straight sales to your company, these shipments having been made during the month of July.

"* * * In addition on the coal which we especially bought for purpose of sharing profits, full details have been furnished Mr. Suffel from time to time." The letter then states that the complete statement of the coal in question which plaintiff forwarded the defendant showed an amount of over $33,000.00, while the defendant had only remitted $25,000.00, but not one word is stated in the letter that

this coal had been sold for cash for the amount plaintiff hadpaid for it at the mines. On the contrary, however, the letter states that plaintiff owes the defendant $5,000.00 for coal on an open account which covered "straight sales". This was not the coal in question, but other coal. On September 6, 1922, plaintiff wrote another letter in which, among other things, it states "That this was a cash transaction." And demands payment and continuing the letter says, "The consigned coal amounted to practically $36,288.00 and you have sent us $25,000.00 on account of this, leaving over $11,000.00 due."

The evidence further shows that Thompson, representing plaintiff, testified that at the time Suffel and Winn called on him at Chattanooga, when Suffel executed the $11,000.00 notes, said that plaintiff could not accept the notes as closing the transaction; that he did not know anything about the financial standing of Suffel, but that he knew the defendant company was financially responsible and that he was not willing to release the defendant until the notes were paid. This witness further testified that he had on prior occasions sold on consignment. On August 12, 1922, Thompson,on behalf of plaintiff, wrote Suffel, representing defendant: "Please refer to the large quantity of very high price coal which was bought on joint venture and consigned to you at Indianapolis. Shippers of this coal are demanding immediate cash settlement for the entire lot of coal and we are not in a position to make this settlement. None of the coal has been disposed of on our books though we have understood that you have sold about thirty cars

of it. * * * Can't you give us disposition of the coal which you have sold up to this time and which we understand amounts to about thirty cars." On cross-examination Thompson was asked whether Winn did not tell him before August 1st that the coal was being shipped to the defendant under some arrangement than the usual out and out sale and he replied, "No, I first learned of this in another way."

There is other evidence in the record tending to show that there were conversations between representatives of the two parties about the advisability of disposing of the coal since the market had dropped below the price plaintiff had paid for the coal, which strongly tends to indicate that the coal was not sold to defendant, but consigned to it. There also is a letter in the record, written by defendant to a representative of plaintiff, dated June 13, 1933, in which it is stated: "Following up our telephone conversation, it will be alright for you to consign coal to us at Indianapolis, via Big Four for re-sale and we will sell all this coal to the very best advantage and split the profit with you fifty fifty after all expenses have been paid * * *. My understanding is that you are consigning fifteen cars to us today at a cost of $3.35 to you." This letter referred to coal not involved in the instant case, and it seems to be agreed that the coal referred to in this letter was not shipped, but it is important as tending to show that the question of consigning coal by plaintiff to the defendant was not first mentioned when the agreement concerning the coal in question was made. There is further evidence in the record to the effect that the invoices sent by plaintiff

to the defendant were merely memoranda invoices and not invoices calling for payments of the amount referred to. There is also in the record a letter written by Thompson, representing plaintiff, to Suffel, representing the defendant, dated June 15, 1923, in which he stated inter alia, "We still have up with them (defendant) the matter of the consigned coal." There is considerable other evidence in the record, but we think it would serve no useful purpose to analyze it further, for we are of the opinion that, upon a careful consideration of all the evidence in the record, the coal in question was consigned to the defendant and not sold; that the defendant was to sell it at the best prices obtainable and the profits were to be divided. Both parties assumed, of course, that there would be a profit and not a loss. After a careful consideration of all the evidence in the record, we are forced to the conclusion that the finding of the trial judge that the coal in question was sold and not consigned is against the manifest weight of the evidence. If the coal was sold for cash as plaintiff contends, its action in accepting from Suffel eleven notes for $1,000.00 each running over a period of about a year, when the testimony is that plaintiff thought Suffel was not financially responsible, while it knew that the defendant was amply able to pay at once, was, to say the least, unusual.

2. As to the twenty cars of screenings the evidence discloses that on or about July 21, 1923, plaintiff sold the defendant twenty cars of screenings at $2.00 per ton f.o.b. mines. The defendant ordered plaintiff to ship the coal to

George G. Pope & Co., Chicago, for the defendant's account. Defendant's written order was dated July 21st, addressed to plaintiff and said: "Please ship as soon as possible * * * ship at the rate of two to ten cars per day." On July 24th plaintiff wrote defendant that it had entered defendant's order to ship twenty cars of screenings to George G. Pope & Co. of Chicago "at once"; four cars were shipped during July and on the first of August, defendant wired plaintiff to cancel the balance of the order, to which plaintiff objected and there was some correspondence between the parties until September 1st when plaintiff treated the contract as having been rescinded by the defendant and plaintiff claims it is entitled to damages measured by the difference between the price at which it sold the coal to defendant, $9.00 per ton, and the market price of the same kind of coal on September 1st, and that the evidence discloses that this difference was $4800.00. The court found in favor of the defendant as to this item and plaintiff has assigned cross errors. The evidence discloses that plaintiff did not ship the coal within the time called for by the contract. This is shown by the evidence in the record, including a letter written by plaintiff to the defendant on August 29, 1923, in which it is said: "You are fully informed as to the railroad conditions and you know it has been almost impossible to ship anything and get it through. The operator from whom we bought this coal claims he has done the best he could and under the very unusual circumstances which have been obtaining I am sure he has done pretty well to ship

anything at all." Defendant's position is that it refused to accept the coal because it was not delivered as soon as called for by the contract and that it was of inferior quality, and there is evidence to sustain defendant's contention on these two points, although we might say that the evidence also discloses that the price of coal had suddenly decreased very rapidly. The evidence further shows that one of the four cars that were shipped contained foreign substances. Upon a consideration of all the evidence in the record on this point, we think we would not be warranted in disturbing the finding of the trial judge for we are unable to say that such finding is against the manifest weight of the evidence. Moreover, we are of the opinion that plaintiff did not show what damages it had suffered by reason of the alleged breach of the defendant in failing to receive the coal, because plaintiff's evidence showed, as testified to by Thompson, one of its officers, that plaintiff had purchased the screenings at the mines at a price of $8.00 per ton; that after defendant refused to accept the screenings it settled with the parties from whom it had purchased them, but he was unable to say what the settlement cost plaintiff. Plaintiff in any event, could recover but the damages it had sustained, and this would not be measured, as plaintiff contends, by the difference between $9.00 per ton, the price it sold to the defendant and the market price at the date of the alleged breach, the evidence showing that plaintiff had settled with the mines and there being no showing that settlement was on the basis of the market price. There was no evidence tending to show that amount plaintiff had been damaged by virtue of the alleged breach, and, therefore,

the finding in favor of the defendant was the only one that was justified by the evidence.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

193 - 28609

AMY H. MAGILL,

Appellant,

v.

BRANKLIN M. MAGILL,

Appellee.

239 I.A. 650

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On June 30, 1924, Amy H. Magill, filed her petition in the Superior Court of Cook County, praying that an order be entered increasing the amount of alimony, payable to her for the support of herself and daughter. The defendant filed an answer and after a hearing the court entered an order increasing the amount of alimony from $125.00 to $175.00 per month and increasing the allowance made for the infant daughter of the parties from $50.00 to $75.00 per month. Both parties prayed and were allowed appeals to this court. Amy H. Magill has perfected her appeal, but the defendant has not.

The record discloses that on August 3, 1918, complainant was awarded a decree of divorce from the defendant and was also awarded the custody of their minor daughter, who was then ten years of age. The decree provided that the defendant pay to the complainant for her alimony $125.00 per month and that he also pay to complainant for the support of their minor daughter $50.00 per month payable in monthly installments. The evidence discloses that at the time the

Opinion filed Oct. 23, 1925.

decree was entered the defendant was earning about $10,000.00 per year, and on the hearing before the court in the matter now before us, which took place on June 30, 1924, the defendant testified that he was employed by Magill-Weinsheimer Company, a corporation, engaged in the lithographing and printing business; that he owned $170,000.00 worth of stock in the company which was about one-fifth of the capital; that he also owned $5,000.00 worth of stock of the Nash Motors Company and had $5,00 .00 of stock in the Shell Union Company; that the Nash Motors Company paid 7 percent dividend and the Shell Union 6 percent; that he was employed by the Magill-Weinsheimer Company on a commission, based on the profits of the business; that for the past two years his income from that source was $20,000.00 per year; that his income in 1918, when the decree was entered, was $10,000.00. There was no evidence as to what income he derived from the $170,000.00 of stock which he owned. He has since remarried, but there were no children by the second marriage. The defendant further testified that he had taken out a $25,000.00 life insurance policy for the benefit of his daughter, the premium of which was from $80 .00 to $90 .00 per year; that he told his daughter, who was then about sixteen years of age, and who was finishing high school and desired to enter the Chicago University, that he would pay her expenses so that she could attend the University. It further appeared from the evidence that he had from time to time given money to his daughter and bought a fur coat for her, for which he paid $30 .00; that he also paid $60 .00 expenses for two months' outing for the daughter at Camp Eyyn, Afon, Wis; that he gave her $100.00 on her birthday and at Christmas.

Complainant testified that she owned the house in which she and her daughter lives and which her father bought for her some years back for $4650.00; that afterwards she bought an adjoining vacant lot for $1300.00 or $1400.00 with money which her father gave her; that since the time the decree of divorce was granted her father gave her from $5000.00 to $6000.00, about $1000.00 per year; that she had about three or four hundred dollars in the bank, about the same as she had at the time of the divorce; that she got $1000.00 from her mother's estate; that the taxes on her property were $112.00 per year, while in 1918 they were but $40.00 per year; that it cost her from $200.00 to $250.00 about every two years to have the house decorated; that it cost her to maintain the table about $15.00 per week; that she had no new clothes to speak of, but a great many of her clothes had been re-made; that she did all her own work; that her house was a two story building and contained nine rooms and, together with her vacant lot, was worth about $15,000.00; that she went to Florida since her divorce, parts of three seasons, her expenses being paid by her father; that her daughter had saved from money received from the defendant about $2,000.00 which she had in the bank. She testified that she could not go to the theater for lack of money; that she resigned the membership she held in a club, because of insufficient means; that she had only been to a theater once or twice since the divorce; that she paid $40.00 tuition for the daughter and $20.00 for ten music lessons. She further testified that the daughter was then going to summer school at Mrs. Atwater's; that she was not able to support herself on $125.00 per month, keeping her house and daughter in school the way she ought to live;

that at the time of the divorce the daughter was young and her clothes were not as expensive as at the time of the hearing, when she was sixteen years of age.

Counsel for the complainant contends that an allowance of $6000.00 should have been made, $4000.00 for complainant and $2000.00 for the daughter. In Gilbert v. Gilbert, 305 Ill. 318, the court said (p.321) "The amount of alimony to be allowed a wife depends not only upon the question of the misconduct of the husband, but also upon the matter of their property and income, their ages, health, past and present habits, social conditions and circumstances and upon the further question whether or not there are children dependent upon one or both of them for support and the amount required therefor by each party. The amount allowed a wife for alimony varies from a sum sufficient to meet the actual wants and necessities of the wife, to a third or more of the husband's income. Where both have an income, the method of computation of what is a proper allowance is to add the wife's annual income to her husband's consider what, under all circumstances, should be allowed her out of the aggregate, then from the sum so determined deduct her separate income, and the remainder will be her proper allowance." In the instant case, the undisputed evidence shows that the defendant's income was more than $30,000.00, while complainant has no income, except that it might be considered that she owned the house in which she lives. Upon a careful consideration of all the evidence in the record, we think it clear that plaintiff cannot live as she should with her daughter on the allowance made by thelearned chancellor. We are also of the opinion that

the least plaintiff should receive for the support of herself and daughter is $5,000.00 per year, $3500.00 for herself and $1500.00 for the daughter, payable in monthly installments.

The order appealed from is reversed and the matter remanded with directions to enter an order in accordance with the views herein expressed and that such allowance be made as of July 2, 1924, the date on which the order appealed from was entered.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

203 - 29620

PATRICK FOLEY, by Mary Foley, his next friend,

Appellee,

v.

BRIDGET JENNINGS, et al, On appeal of WM. ALBRECHT, etc.,

Appellant.

239 I.A. 651

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, by his next friend, brought suit against Bridget Jennings and Rose Jennings, her daughter, to recover damages claimed to have been sustained by him for personal injuries. The suit was dismissed as to Rose Jennings, the daughter and after a hearing there was a verdict and a judgment in plaintiff's favor for $3,000.00 and the defendant, Bridget Jennings, appeals.

The record discloses that on the evening of June 23, 1922, Rose Jennings was driving an automobile north in Halsted street and, as she was passing a north bound street car at the intersection with 45th street, the automobile struck and injured plaintiff, a boy about fourteen years of age as he was alighting from the street car. The automobile belonged to Rose Jennings' mother, the defendant Bridget Jennings, and it was plaintiff's contention that Rose Jennings was driving the automobile at the expressed direction of the defendant, her mother, at the time in question.

No question is raised on this appeal as to the

Opinion filed Oct. 28, 1952.

proof of negligence in the operation of the automobile or as to the exercise of due care on the part of plaintiff and counsel for the defendant in his brief states that only that part of the record is abstracted which tends to show the ownership of the automobile and the purposes for which it was being used at the time. And he contends that the record discloses that the automobile was not being used at the time of the accident "on the business of or by an agent of Bridget Jennings and the sole liability rests on Rose Jennings."

The record discloses that Rose Jennings lived with her father, her mother, the defendant, and her brother at No. 3716 Parnell avenue, Chicago; that about a year and a half before the accident the mother purchased the automobile and obtained a license authorizing its operation; that Rose was the only member of the family who drove the car; that she was a stenographer and employed at the stock yards; that after she came home from her work on the evening of the accident, she took a Miss McCarthy, who was a friend of the family and who had been visiting the defendant that day, to her home which was located at 62nd and Wood streets; that when they arrived at Miss McCarthy's home, Rose telephoned another friend of the family, a Miss Hudson, who lived at 56th street and Peoria avenue, and it was arranged that Rose would drive with Miss McCarthy to Miss Hudson's home and take the latter to a dressmaker, whose place of business was a block or two north of where Rose lived on Parnell avenue. Accordingly, Rose, with Miss McCarthy in the car, drove to Miss Hudson's home,- then started north in Halsted street and when they reached 45th Street, the accident occurred.

Mary Foley, the mother of the plaintiff, and his

sister, Mrs. Moran, testified that shortly after the accident and while the plaintiff was in the hospital as a result of his injuries, the defendant, Bridget Jennings, called to see how he was getting along; that at that time the defendant stated that she had bought themachine for her family's use and on the day in question had sent her daughter Rose to get some groceries and to bring a couple of girls back to her home for supper and that Rose was on her way home when the accident occurred.

The defendant, Bridget Jennings, did not testify for the reason, as the evidence shows, she was confined in the insane hospital at Elgin for several months prior to the time of the trial. No conservator or guardian ad litem intervened in her behalf on the trial and no reference is made to this fact by either party. Sec. 30, Chap. 1, Cahill's Statute.

Rose Jennings testified for the defendant that when she came home from work on the day of the accident, she found Miss McCarthy at her home visiting her mother; that she took Miss McCarthy to her home and had dinner with her and afterwards, about a quarter to seven o'clock, left Miss McCarthy's home taking her in the automobile; that she then drove over to 56th and Peoria streets to Miss Hudson's home, and was going to takethe latter to a dressmaker, who was located between 35th and 36th streets on Parnell avenue, a short distance north of where the Jennings lived. She further testified that she was not sentby her mother to buy groceries or to pick up anybody to take to their home that night to dinner; that she was not on any errand for her mother at the time, but that she took Miss McCarthy because the latter wanted her to drive her home

and have dinner with her. She further testified that her mother knew she was taking Miss McCarthy home but was not requested by her mother to do so, and that she had her mother's permission to do so.

There is other evidence in the record as to the obtaining of the license and repairs on the machine, but we think it is unnecessary to comment upon it for we are of the opinion that there was evidence tending to show that Rose was driving the car at the request of the mother at the time in question. In these circumstances, of course, the mother would be liable for the negligence of her daughter in the operation of the automobile. We think the facts in this case as disclosed by the evidence would make the defendant liable for the negligence of her daughter on the ground that the latter was her agent or servant and on her business or errand at the time of the accident, and think it is unnecessary to discuss the cases of Arkin v. Page, 287 Ill. 420; Graham v. Page, 300 Ill. 40; Cloyes v. Plastic, 231 Ill. App. 183; Gates v. Mader, 316 Ill. 313 and other authorities cited by counsel.

The defendant further complains that the court erred in admitting in evidence an ordinance of the City of Chicago which prohibits the driving of an automobile past a street car when the latter is taking on or discharging passengers and that the court erred in instructing the jury as to the provisions of the statute relative to the speed of the automobile. These questions were only material in determining whether the automobile was operated negligently at the time of the accident and since counsel for the defendant makes no point of this, it would be a matter of super-

erogation to discuss these contentions. But we might say, however, that we have looked into the record and are of the opinion that the judgment ought not be disturbed on account of these contentions.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

24634

315 - 29633

M. GETTLEMAN,

Appellee,

v.

MR. E. LEBENSBERGER and
MRS LUELLA LEBENSBERGER,

Appellants.

239 I.A. 651

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On April 17, 1922, plaintiff brought suit against the defendants to recover $750.00, claimed to be due him for the balance of the purchase price of an ermine fur coat. The defendants were served and on April 28th filed their appearance and an order was entered on that date extending the time within which they might file an affidavit of merits ten days. On May 8th, they filed an affidavit of merits and on July 11th following the affidavit of merits on motion of plaintiff was stricken and the defendants were given leave to file an amended affidavit of merits in four days. On July 24th the court entered an order on motion of the plaintiff, granting him leave to file an amended statement of claim within one day and the defendants were ruled to file their affidavit of merits five days thereafter. On July 25th the plaintiff filed his amended statement of claim and on August 5th following the defendants were defaulted and judgment entered against them for $767.75. Five days later, on August 10th, the court on motion of the defendants set aside the default and judgment and the defendants were

given leave to file an affidavit of merits within ten days. On August 14th they filed their affidavit of merits. The following May 4th, 1933, the cause came on for hearing in regular course before the court without a jury. The defendants failed to appear. The court heard the evidence and found the issues against the defendants and entered judgment in plaintiff's favor for $767.75. The next that appears from the record was an order entered February 11, 1924, on motion of the plaintiff. The clerk was ordered to restore the execution which had been lost. On July 11,1934 an order was entered, giving leave to the defendants to file a petition, seeking to vacate the judgment entered May 4, 1933, and the matter was continued until the 18th of July, 1934. The motion then came on for hearing and on motion of plaintiff, the court struck the petition from the files. From this order the defendants prayed and were allowed an appeal.

The petition which was verified by one of the defendants, set up that he purchased an ermine wrap and bag from the plaintiff for $1500.00; that he paid $750.00 on account of the purchase price; that later he offered his check for the remaining $750.00, which plaintiff refused and that plaintiff refused to deliver to either of the defendants the bag. The petition further set up that "through an error on his part, a judgment was entered against both defendants for $750.00"; that the bag was not delivered at any time; "that the attorney for the said plaintiff stated on this day and date in open court that the coat or wrap which was delivered was worth $900.00. That your petitioner is informed and believes and so states it to be a fact that counsel for said plaintiff also said in open court to the attorney for this

petitioner that said bag was worth $500.00. That if said coat, however, was worth $900.00, then said bag was worth $600.00."

"That the delivery of said bag would have preceded the filing of the suit therein. * * * Said judgment, however, was entered more than thirty days previous to this day and date."

"That it is inequitable that the said plaintiff keep the said bag and have a judgment not only for the balance of $150.00 on the coat, but also for the value of the bag itself."

It is further set up in the petition "that he did not know a judgment had been entered until more than thirty days after the same; that he did not know from that time to this day and date that the judgment could be vacated. That he is informed and believes * * * that his attorney was of the opinion and believed that said bag had been delivered previous to the entry of said judgment * * *. That said attorney did not know until your petitioner informed him in open court this day and date that the same had not been delivered and that his attorney learned said fact at about 10;45 A.M. this 10th day of July, 1924." The prayer was that the judgment be vacated and set aside "except as to the balance due on said coat to-wit the sum of $150.00."

It is obvious that the court did not err in striking this petition. It showed no diligence on the part of the defendants, but on the contrary, it clearly appears from the petition that the defendants were negligent. Before a judg-

ment in the Municipal Court may be vacated after the lapse of thirty days, the defendant must show by his petition that he has acted with due diligence.

We have above set forth the dates of the various proceedings which go to show that the defendants showed no diligence in the matter. It follows, therefore, that the order of the Municipal Court appealed from must be affirmed.

ORDER AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

230 - 29647

J. S. ELLIOTT,

Appellee,

v.

RALPH BIRCHARD, doing business as BIRCH MOTOR CARS,

Appellant.

239 I.A. 651

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $1085.00 which he had paid to the defendant for an automobile and four wire wheels. There was a verdict and judgment in plaintiff's favor for the amount of his claim and the defendant appeals.

The record discloses that plaintiff lived at Prescott, Arizona and sometime during the year 1917 had taken a correspondence course in connection with automobiles with the Birch Motor College of which the defendant was president, and received a diploma certifying that he had completed a course in automobile driving, repairing and selling, and that he was "a duly qualified chauffeur and competent to drive, keep in repair and sell any gasoline driven touring car, roadster, taxicab or truck." It further appears from the evidence that the defendant was engaged in the business of selling new automobiles which apparently were manufactured for him and which were known as Birch Motor Cars. On March 19, 1921, defendant sent a circular letter to plaintiff which was addressed "To all Agents", advising them of the

Opinion filed Oct. 28, 1952.

automobiles and the prices which the defendant had for sale. There was some correspondence had between the parties and on April 26, 1921, plaintiff wrote a letter to the defendant in which he enclosed his check for $1095.00, $995.00 being in payment of an automobile and $100.00 for a set of wire wheels. The automobile at that time was in a warehouse at Dallas, Texas. On May 6th the defendant delivered the automobile at Dallas to the railway company to be delivered to plaintiff at Prescott. The automobile arrived about May 26th at Prescott, and on the 28th of May plaintiff first saw it and he, together with two other men, examined it and claimed that it appeared to be an old second hand car with a number of defects. He refused to accept the automobile and advised the defendant to this effect and demanded the return of his money, which demand was refused. Later the automobile seems to have been taken by the railroad company to San Francisco and there sold for charges.

All of the evidence is in the form of depositions, none of the witnesses appearing before the court or jury. The defendant contends that the verdict and judgment is against the manifest weight of the evidence and, in this connection, it is said that this court is in a good position to determine the weight of the evidence as the jury or the trial judge, since none of the witnesses appeared on the trial. Three witnesses testified on behalf of the plaintiff, who lived at Prescott and who examined the car on May 28th at the railroad depot at that point. The testimony of these three witnesses it to the effect that the automobile was not a new car, but was a second hand car and appeared to have been used considerably; that the radiator had been

cracked and soldered and had been painted over; that there was no name plate on the car to indicate that it was a Birch car; that the paint was poor and it appeared that the automobile had been exposed to the weather; that the clutch was not in working order - it seemed loose and rattled; that the fenders were scratched and were somewhat bent; that there was a dent in the gas tank; that mud was on the inside of the fenders and some of the rods of the car were rusted; that there was oil and dirt around the motor indicating that it had been used; that the radiator cap was gone; that the holder for the extra tire was broken. If the testimony of these witnesses is substantially true, it is clear that the automobile when it arrived at Prescott was not a new car and was in such condition that no one would buy it for a new car. But the defendant contends that it appears from the evidence that when the car was delivered to the railroad company at Dallas, it was a new car and in good condition, and that if anything occurred to damage the car, it was after it had been delivered at Dallas to the railroad company and that since plaintiff was to pay the freight charges from Dallas to Prescott, the car became plaintiff's property upon delivery in Dallas to the railroad company. A witness testified on behalf of the defendant, that he delivered the car at Dallas to the railroad company and his evidence is to the effect that the automobile was new and in good condition when he delivered it at that point to the railroad company. But a reading of his testimony, as it appears in the record, discloses that this witness did not recall the condition of the automobile and was apparently testifying from what he observed was noted on the bill of lading. He was asked these

questions on cross-examination. "Q. Do you know whether or not the fenders on the car were damaged and the radiator cap was gone when it was delivered to the Dallas Transfer Company. A I do not. Q. Then you know nothing whatever about the condition of the car at the time it was delivered to the Dallas Transfer Company. A. I do not." The defendant testified that he had shipped the car in question from Chicago to Dallas some two or three months prior to the time it was sent to Prescott from Dallas and at that time it was a new car and he had ordered it in storage at Dallas.

The evidence on behalf of the plaintiff further tends to show that there was no evidence of the automobile being in a railroad wreck occurring during the transportation from Dallas to Prescott.

We have carefully examined all the evidence in the record and are of the opinion that the finding of the jury in favor of plaintiff is supported by the evidence and it being admitted that plaintiff bought a new car as well as a set of new wire wheels and having paid $1095.00 therefor, and not having received a new car as the evidence shows and the wire wheels not having been sent to him, he was entitled to the return of his money.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

243 - 29659

MILK PRODUCERS CO-OPERATIVE MARKETING COMPANY, a corp.,

Appellee,

v.

GEORGE SELLAS, PETER SELLAS AND JAMES SELLAS, co-partners, as SELLAS BROS.,

Appellants.

239 I.A. 651

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendants to recover $1203.80, claimed to be due it from the defendants for a balance due for cream sold and delivered to the defendants. The defendants filed a setoff claiming $1800.00 damages for the failure of plaintiff to deliver to defendants milk as per contract entered into between the parties. Issues were joined on plaintiff's statement of claim and the defendants' setoff and the defendants having admitted the amount of plaintiff's claim, they produced witnesses tending to support their claim of setoff and at the close of defendants' case, the court peremptorily instructed the jury to find the issues for the plaintiff on their statement of claim and against the defendants on their setoff and to assess plaintiff's damages at $830.58. A verdict was returned accordingly, judgment entered on the verdict, and defendants appeal.

It appears from the evidence that, on the 30th of January, 1923, plaintiff and the defendants entered into

Opinion filed Oct. 28, 1925.

an agreement, whereby plaintiffs were to sell to the defendant a certain quantity of cream at a certain price to be delivered during the month of February, fifteen cans to be delivered each day; that plaintiff made delivery under this agreement for eleven days of the month and thereafter refused to make further delivery. It further appears from the evidence that about five minutes after the written memorandum was signed by the parties, providing for the delivery of cream for the month of February, the parties entered into a further agreement whereby plaintiff was to deliver to the defendants cream during the months of March and April on the same terms. After this evidence was introduced by the defendants, the court struck out all of it that pertained to the months of March and April, apparently on the ground that it tended to vary the terms of the written memorandum signed by both parties. And it further appears that there was an allowance made to the defendants for the damages they had sustained by reason of the failure of plaintiff to furnish cream after the 11th of February for the balance of that month and these damages were deducted from the amount of plaintiff's claim, leaving the amount of the verdict and judgment. The court was in error in striking out the evidence offered by the defendants concerning the milk that was to be delivered during March and April. This evidence did not tend in any way to vary the terms of the written agreement, because the written agreement had reference only to the delivery of cream during the month of February, and the evidence shows that the agreement between the parties in reference to the cream to be delivered during March and April was a subsequent oral agreement.

Plaintiff contends, as we understand it, that even if there was a subsequent agreement entered into between the parties with reference to the delivery of cream during the months of March and April, it was barred by virtue of the provisions of Sec. 4 of Chap. 121-A Cahill's Statute. That section is entitled, "Statute of Frauds" and provides, in part, that a contract for the sale of any goods of the value of $500.00 or upwards shall not be enforcible unless some note or memorandum is signed by the party to be charged or his agent in that behalf. The Statute of Frauds, if relied upon as a defense, must be pleaded. No such matter was pleaded in plaintiff's affidavit of merits to defendant's setoff. Nor was any such defense interposed on the trial, and it is obvious that this cannot be urged for the first time in a court of review.

There is nothing said in the case of Farmers' Grain Co. v. Kane, 289 Ill. 538, cited by counsel for the defendant, that holds that the provisions of Sec. 4, Chap. 121-A, only applies to contracts that could not be performed within one year. All the court said in that case was that if the contract involved a sale of chattels of the value of more than $500.00 and could not be performed within a year, it would come within the provisions of Sec. 1 of the Statute of Frauds as well as Sec. 4 of Chap. 121-A.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

351 - 29768

473 Ia

239 I.A. 652

MARMON-CHICAGO COMPANY, a corp.,

Appellee,

v.

ESTATE OF ROSE MASTROFSKY, DECEASED, SAMUEL MASTROFSKY, EXECUTOR,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff filed its claim in the Probate Court of Cook County against the Estate of Rose Mastrofsky for $870.20, which sum was claimed as a balance due for the purchase price of a Marmon automobile sold to the deceased in her life time. After a hearing, the claim was allowed for $855.70. An appeal was taken to the Circuit Court of Cook County where the case was tried before the court without a jury and there was a finding and judgment in claimant's favor for $830.70. The claim was allowed as of the 6th class and it was ordered to be paid in due course of administration.

The record discloses that on April 13, 1921, Rose Mastrofsky purchased a second hand Marmon automobile from the claimant for $1800.00. She made a cash payment of $100.00 and turned in a Ford car for which she was given credit for $600.00, and the balance was represented by her notes secured by a chattel mortgage on the Marmon car. She afterwards made payment on the notes and at the time the claim was filed

Opinion filed Oct. 28, 1925.

there was remaining due $248.70. On the day that Rose Mastrofsky turned in the Ford automobile to the Marmon Company, the latter company sold it to one Murray Rice for $575.00, who, in turn, sold it to one Donlin. Afterwards the police took it away from Donlin on the ground that the Ford was stolen the day before Rose Mastrofsky turned it into the Marmon Company and the car was eventually turned over to an insurance company which apparently had insured the car. The evidence further tends to show that on April 11, 1921, the day before Rose Mastrofsky purchased the Marmon car, the Ford which she gave in part payment was stolen from R. B. Dennis, who reported the fact that it was stolen to the Chicago police and the following February, the police found the car in the possession of Donlin. Rice who purchased the Ford car from the Marmon Company, demanded the return of the $575.00, which he had paid for the Ford car, and after investigation, the Marmon Company refundedthe $575.00. That company then filed its claim for $600.00, the amount of credit they gave Rose Mastrofsky when they took in the Ford car. The balance of the claim was not disputed. The trial judge held that the claimant was entitled to have its claim allowed for $575.00, the amount it received for the Ford car from Rice and which it was required to refund.

1. The executor of the estate contends that the evidence does not sufficiently prove that the car which the police took from Donlin was the same car that Rose Mastrofsky turned in to the Marmon Company in part payment of the automobile which she purchased in April, 1921. This contention is based upon the fact that the evidence shows that when Rose

Mastrofsky turned in the Ford car, the number of the engine was 4568008, while the evidence shows that the number of the engine in the car which was stolen from Dennis was 4568084. We think it clear from an examination of the evidence in the record that it was Dennis' car that was turned in to the Marmon people by Rose Mastrofsky. A police officer testified that the figures "84" in the number of the engine were filed off and the figures "08" were placed over them; and other evidence in the record clearly shows that the car was specifically identified by other marks. There can be no question but that the court rightfully found that the car recovered by the police was the one given to the claimant in part payment of the Marmon car.

2. A further complaint is made by the executor of the estate that the trial judge applied the wrong measure of damages, but it is not pointed out in the argument what the correct measure of damages is. Since the evidence clearly shows that the Ford automobile did not belong to Rose Mastrofsky when she turned it in to the Marmon Company and that it gave her credit for $600.00, and since it was required to refund the amount they sold the car for to Rice, viz. $575.00, the value of the car was, at least, $575.00. The sale of the car by the Marmon people to Rice was done in the ordinary course of business and there is no contention that it was not a bona fide sale. In these circumstances, the price paid for the Ford is evidence of its value. Cloyes v. Plastis, 331 Ill. App. 183.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

473 Ia

360 - 29777

ROBERT C. GRAHAM,
Appellant,

v.

CHICAGO TRUST COMPANY,
Appellee.

239 I.A. 652

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1935.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of replevin against the defendant to obtain possession of two bonds of $500.00 each. The bonds were taken on the writ by the bailiff of the Municipal Court and delivered to plaintiff. The appearance of the defendant, Chicago Trust Company and Edward Walsh and Anna Walsh, were entered by their counsel, who demanded a trial by jury. No affidavit of merits was filed by the defendant or Edward Walsh and Anna Walsh. The case was tried before a judge and a jury and there was a verdict that the right to the possession of the property was not in the plaintiff and assessing the defendants damages at one cent. Judgment was entered on the verdict and a writ of retorna habendo awarded. From this judgment plaintiff appeals.

The record discloses that plaintiff was engaged in the real estate business and on the first day of April, 1934, Edward Walsh and Anna Walsh, his wife, went to plaintiff's place of business, concerning the purchase by them of a piece of real estate which they had learned was for sale by plain-

Opinion filed Oct. 28, 1985.

tiff. They talked the matter over with plaintiff and he informed them where the property was located and they went to examine it. An hour or so thereafter, they returned to plaintiff's place of business, after having seen the property, and it was agreed that if plaintiff would accept two bonds of $500.00 each, which belonged to Mrs. Walsh and which she had deposited for safe keeping with the Chicago Trust Company, in lieu of $1,000.00 earnest money, they would purchase the property. Thereupon plaintiff prepared the ordinary memorandum agreement for the purchase of the property by the Walshes and the sale of it by one Kewin. The Walshes signed the contract at that time and sometime afterwards, the exact time not appearing, it was signed by Kewin. Apparently the Walshes became dissatisfied and refused to carry out the deal, although the record has little or no evidence on this point. At the time of the execution of the contract by the Walshes, they executed a written assignment of the "Safe keeping certificate" which Mrs. Walsh held and which had been issued to her by the defendant bank for the two bonds. Sometime after the contract was signed by the Walshes, apparently plaintiff made demand on the Chicago Trust Company for the two bonds, which they refused to deliver, apparently for the reason that the Walshes had told the bank not to do so, although there is little evidence on any of these points in the record, the facts being very meagerly brought out on the trial. Plaintiff having been unable to obtain the two bonds from the bank, brought replevin.

The bank, the Chicago Trust Company, apparently

interposed no defense, but there was a defense made by the Walshes and it appears to be their theory, although they have filed no brief in this court, nor has the bank, that the contract for the purchase and sale of the property was brought about by the fraud of plaintiff. The alleged fraud being that the property was not worth more than $4,000.00, while the contract provided that the Walshes were to pay $7,000.00 for it. The evidence tends to show that plaintiff in endeavoring to induce the Walshes to purchase the property, told them that it was a good buy; that there were five flats bringing in a total rental of $100.00 per month; that the Walshes went to look at the property, but were unable to obtain access to some of the flats and the basement; that when they returned to plaintiff's place of business, he advised them that the flats they had not examined were as good or better than the ones they had seen. There is no evidence that this statement of plaintiff was not true. The Walshes produced a witness who was in the real estate business and who examined the property and gave it as his opinion, that the property was not worth more than $4,000.00 and some testimony to the effect that the north side of the building was out of line so much "that it would be dangerous to touch it."

Four witnesses testified for the defendants and gave their opinion that the property was worth about $7,000.00. The representations made by plaintiff to the Walshes and prior to the execution of the contract by them as to the value of the property and that it was a good buy, was merely trade talk. He did not misrepresent the gross

rentals received, nor was there any misrepresentation as to the building so far as the evidence shows. If the side of the building was out of plumb as a witness testified, so far as the record discloses, this was as easily observable by the Walshes as any one. At the close of all the evidence plaintiff moved for a directed verdict which the court denied. We think this was error. There was no evidence of any fraud on behalf of plaintiff and the court should have directed a verdict for plaintiff as requested.

The judgment of the Municipal Court of Chicago is reversed and judgment for plaintiff is entered in this court.

JUDGMENT REVERSED AND JUDGMENT HERE.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

4733

239 I.A. 652

375 - 29732

EDWIN A. CASEY,

Appellee,

v.

CITY OF CHICAGO,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant to recover $3887.73, which he had deposited in accordance with the provisions of an ordinance passed July 8, 1909 for the vacation and closing of certain streets and alleys. The ordinance provided that it should take effect from and after its passage, provided that Casey should within sixty days pay to the City of Chicago $3887.73 towards a fund for the payment and satisfaction of any and all claims for damages caused by the vacation and closing of the streets and alleys, and provided further that Casey should within sixty days after the passage of the ordinance file a certified copy of it in the Recorder's office of Cook County. Casey complied with the ordinance and no claim having been filed against the city on account of the vacation or closing of the streets and alleys within five years, he demanded the return of the money, which demand was refused. The defendant filed a number of pleas to the declaration, among them being a plea of the Statute of Limitations of five years.

Opinion filed Oct. 28, 1926.

Replication was filed to this plea, demurrers to certain other pleas which it is unnecessary to state and after issues were joined, the cause was submitted to the court without a jury and there was a finding and judgment in plaintiff's favor for the amount of his claim. Afterwards and within the term, the judgment was vacated on motion of plaintiff and he asked that interest be allowed on the amount he had deposited and included in the judgment from the date he had made a demand upon the city for its return, viz. December 12, 1918, which was more than five years after he had made the deposit, to the date of the trial. This was allowed and judgment was entered for $4855.58, which included interest in the sum of $967.85.

Plaintiff having deposited the money in accordance with the provisions of the ordinance and no claim for damages having been filed against the city on account of the vacation of the streets and alleys mentioned in the ordinance within five years and plaintiff having made a demand for the return of his money, and the demand having been refused and having started suit less than five years after the demand, he was entitled to recover the amount of his deposit. Lockwood & Strickland Co. v. City of Chicago, 279 Ill. 445; J. M. Smyth & Co. v. City of Chicago, 284 Ill. 136; Teich v. City of Chicago, 298 Ill. 498; Rand, McNally & Co. v. City of Chicago, 216 Ill. App. 510; Hamilton v. City of Chicago, No. 29781 Appellate Court, First District (not yet reported); And he was also entitled to recover interest from the date of his demand. Conway v. City of Chicago, 337 Ill. 188; Hamilton v. City of Chicago, supra. The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

388 - 29805

OTTO R. BARNETT AND PERCIVAL TRUMAN, doing business as BARNETT & TRUMAN,

Appellants,

v.

CHARLES H. BARTHOLOMEE,

Appellee.

239 I.A. 652

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs, who are practicing lawyers in Chicago, brought suit against the Velvatone Talking Machine Co., a corporation and Charles H. Bartholomee to recover for legal services rendered and moneys advanced. During the course of the trial, which was before the court without a jury, plaintiffs dismissed as to the Velvatone Talking Machine Co. and, at the close of plaintiff's case, the court found the issues for the defendant, Bartholomee.

The two defendants filed an affidavit of merits, made by Bartholomee in behalf of himself and as agent on behalf of the Talking Machine Co., in which it was set up that plaintiffs' services and disbursements were rendered on behalf of the Talking Machine Co. only; that the charges made were excessive and unreasonable and more than was the customary charge for similar services by lawyers in Chicago, and the defendants further set up as a defense, the five years Statute of Limitations. The evidence tends to show that the

Velvatone Talking Machine Company was a corporation of which the defendant, Bartholomee, was president, and that Bartholomee consulted plaintiffs, who were patent attorneys in Chicago, to ascertain whether the Talking Machine Company might do certain acts without being liable for infringement of patents, and further consulted with plaintiffs in reference to obtaining certain letters patent; that plaintiffs began rendering legal services by having the records in the patent office at Washington investigated and conferring from time to time with Bartholomee. The first services which are involved in the instant case were rendered about June 5, 1916 and the last September 18, 1917, and the instant case was begun October 10, 1923.

It is the defendant's contention that, in view of the evidence, the contract, if any, that was entered into between plaintiffs and the defendant was an oral contract and barred by the Statute in five years, while it is plaintiffs' position that the contract involved was a written contract and, therefore, not subject to the five years Statute of Limitations.

The plaintiff, Truman, testified that, in the spring of 1916, the defendant, Bartholomee came to plaintiffs' office with a man named Armstrong and stated that he was organizing and financing a corporation to be known as the Velvatone Talking Machine Co.; that the defendant wanted plaintiffs to prepare an application for letters patent of a certain invention; that the witness told Bartholomee that it would be advisable to have a thorough search made in the patent office at Washington to determine the patentability of the alleged inventions

of Armstrong and whether there were any outstanding patents; that there were a number of conferences with Bartholomee, particularly in reference to the question of infringement; that about the 6th of July, 1916, Bartholomee came again to plaintiffs' offices and stated he would like to know definitely what his liability would be in case he placed an order for a number of phonograph cases, to which the witness replied he would not advise without a thorough search was made in the patent office, and possibly in foreign fields; that, thereupon, Bartholomee told the witness to go ahead and make the search; that afterwards on or about July 28th, Bartholomee again called at plaintiffs' offices in reference to the matter and he was then told by the witness that unless Bartholomee assumed personal responsibility for plaintiffs' services and disbursements, plaintiffs would not be willing to go on with the search as they did not know the financial standing of the Talking Machine Company and, in reply, Bartholomee told plaintiffs to go ahead with the work. The next day, July 29th, the witness wrote Bartholomee a letter which is in evidence in which plaintiffsstated "As explained to you yesterday, if a patent search is to be made on the talking machine proposition it will have to be a thorough and complete one to be of any value. The Velvatone Talking Machine Company is a new concern and its financial responsibility is unknown to us. Will you be willing to assume personal responsibility for payment of our bill for services and expenses against the company in regard to the search which we have under way? We shall do everything possible to make this search as expeditiously as possible but, for reasons explained to you yesterday, it is

going to involve at best a considerable amount of investigation." The letter then stated that there would be considerable expense, including the services of their Washington correspondent and asked for $250.00 on account of the work already done and to be done, and advised Bartholomee that they had written their Washington correspondent to push the investigation with all possible haste. This was signed by plaintiffs. About August 3rd following, plaintiffs received through the mail the following letter: "Barnett & Truman, Suite 1518-22 Monadnock Block, Chicago, Ill., Attention Mr. Truman: My dear Mr. Truman: Answering yours of the 29th ult., I beg to say that the writer will assume the responsibility you mentioned in your letter. I will call upon you in the next few days in regard to the advances which you also wrote about. Do not let this stand in the way, but let this search go on with the least possible delay so that we might know where we are at.

"Thanking you to give this matter your attention, we are,

Yours truly,

VELVATONE TALKING MACHINE CO.
CHB"

After plaintiffs had introduced the letter just quoted, and when they were attempting to prove that the initials under the name Velvatone Talking Machine Co. "CHB" were in the handwriting of Bartholomee, counsel for the defendant suggested that Mr. Bartholomee would be soon in court and that matter could then be proved by him, and this was acquiesced in by the plaintiffs. Thereupon the witness Truman continued and testified that after receiving the letter of August 3rd, plaintiffs proceeded with the investigation and made a preliminary

typewritten report and gave a copy of it to Bartholomee at a conference held at plaintiffs' office. He further testified that after receiving the letter of August 3rd, he instructed his Washington correspondent to continue with the work, which was done; that the correspondent sent two or three hundred copies of patents from the patent office at Washington, which the witness examined in connection with the work he was doing for defendant; that the witness on another occasion told Bartholomee he could not go further without having some money; that Bartholomee promised to send him some on account, but nothing was received; that in connection with the work, plaintiffs filed an application for registration of the trademark, "Velvatone" in the patent office at Washington and that objections were filed to the application and, in this connection, the witness had several conferences with Bartholomee; that on July 23, 1917, plaintiffs wrote a letter to Bartholomee, which was produced by the latter on the trial. In this letter plaintiffs called Bartholomee's attention to the fact that he had no reply to the letter of May 9th regarding balance due of $374.35 from the Talking Machine Company and continuing the letter stated "We beg to call your attention to the fact that on July 23, 1916, we wrote you noting that the Velvatone Company was a new concern whose financial responsibility was unknown to us, and asking whether you would personally assume responsibility for our services and expenses then being incurred."

"Under date of August 3, 1916, you wrote stating that you would be responsible and urging us to proceed promptly with the matter."

"In view of this clear personal responsibility on your part, we must ask a prompt settlement of the account." To this letter Bartholomee replied by writing a letter to plaintiffs, dated July 26, 1917, in which he said: "Answering yours of the 23rd inst. beg to say, at the time that we incorporated the Velvatone Talking Machine Co., we fully expected the same would be a success."

"Mr. Armstrong, one of my associates, and Mr. Maloney who had charge of the stock selling, failed utterly in doing anything to promote the interests of the company."

"The writer was so sure of success on the part of these two men that he put his "all" into it and paid every bill as long as there was money to pay with. In fact the matter of the Velvatone Talking Machine Co. has cost me every cent that I possessed and I am practically penniless. We fully realize that if the Velvatone Talking Machine Co. ever becomes a success, there will be plenty of money in it, but it takes money to accomplish this."

"Being as the writer has everything tied up in the Velvatone Talking Machine Co. I do not see what I can do to pay any bills. I am even in debt on my own personal household expenses."

Rest assured that as soon as we can see daylight ahead for the Velvatone Talking Machine Co. your account will be taken care of."

Yours very truly,

C. H. Bartholomee."

The witness further testified at the several conferences he had with Bartholomee, he asked for money on account and on each occasion Bartholomee promised to pay very shortly. It was admitted on the trial that the items of disbursements for which suit was brought were correct and that the charges made for services were reasonable. The witness was then interrogated as to whether the initials "CHB" signed to the letter of August 3rd above quoted, was in the handwriting of Bartholomee, when counsel for the defendant advised Bartholomee was then in court and could answer that question and the court suggested that Bartholomee be called under section 33 of the Municipal Court Act, which was done. Bartholomee thereupon took the stand and testified that the initials were not in his handwriting; that he dictated the letter of August 3rd, but did not place his signature thereon, nor did he authorize any one to mail it. The court then asked Bartholomee this question: "Q. What was the purpose of your dictating the letter? A. Well, the purpose was that the matter of selling stock for the company by the attorney, Mr. Huff, at that time, he told us that he would have money for us right along, he told me to go ahead and buy whatever I wanted to buy and he would have plenty of money for us, and the consequence was I never sold any stuff. I paid out everything I had and lost everything I had, and that was the end of it. * * * Our attorney at that time suggested we go ahead with the factory and everything else and as soon as they sold the stock, I would be reimbursed for everything I paid in and the bills taken care of, and that is the reason I paid part of Barnett and Truman's stuff that I put into the Velvatone Company."

Plaintiff then introduced an affidavit of merits signed and sworn to by Bartholomee and filed in a suit by plaintiffs against the two defendants on the same cause of action, and which was dismissed for want of prosecution, in which Bartholomee swore (inter alia) "That the liability of these defendants to the plaintiffs, if any, is for cash disbursements advanced by the plaintiffs, for and in behalf of the defendants herein and for unliquidated damages for the breach of the implied promise of the defendants herein, to pay plaintiffs herein, the reasonable value of the services rendered by the plaintiffs for these defendants." Bartholomee further testified denying some of the matters testified to by Truman to the effect that, unless Bartholomee agreed to be personally responsible for the services and disbursements, plaintiffs would stop work.

The court after argument of counsel, stated that if the letter of August 3rd had been signed by the defendant, Bartholomee, there would be a different situation, but since Bartholomee testified that he did not place his initials to that letter, plaintiffs could not recover. We think the finding of the court to the effect that Bartholomee did not place his initials on the letter of August 3rd is clearly against the manifest weight of the evidence. We think this appears in part by the testimony of Bartholomee himself, wherein he admitted in explaining to the court the reason he dictated that letter. An examination of his testimony in this respect shows that the only reason he did not pay the bill was that he did not receive the money from the sale of the stock and it tends to show that he did personally agree to be responsible as the witness Truman testified. This further appears from Bartholomee's

letter of July 26th, 1917, which was written in reply to plaintiff's letter to him of July 29, 1917. Plaintiffs' in that letter specifically referred to their letter of July 29, 1916 and to the fact that Bartholomee had personally agreed to be responsible to plaintiffs for the services which they rendered and were to be rendered and the disbursements made, and particularly calling attention to the letter of August 3rd. Bartholomee does not deny this in his letter of August 26th, but it is clear that he did assume personal responsibility by his letter of August 3rd and that the letter of August 3rd was properly admitted by the court. Plaintiffs, by their letter of July 29, 1916, made a proposition to the defendant Bartholomee that they would proceed with the work only on condition that their services and disbursements would be paid personally by Bartholomee and his letter of August 3rd to them accepted this proposition. The contract thus made was in writing and the five years Statute of Limitations does not apply. Moreover, we are of the opinion that even if the defendant had not written the letter of August 3rd, yet he would be clearly liable, because plaintiffs in their letter of July 29th in effect stated that they would render services and make certain disbursements only upon conditions that the same were paid by the defendant Bartholomee. Thereafter, Bartholomee was advised from time to time that plaintiffs were proceeding with the work, he, therefore, accepted by his acts the proposition made in the letter of July 29th and this constituted a contract in writing. Ames v. Noir, 130 Ill. 582; Memory v. Niepert, 131 Ill. 623; Johnson v. Dodge, 17 Ill. 433; Short

v. Kieffer, 142 Ill. 258; Vogel v. Pekoc, 157 Ill. 339; Sellers v. Greer, 172 Ill. 549.

The defendant contends that the statement of claim was against the two defendants and that during the trial upon motion of the plaintiffs, suit was dismissed as to the defendant, Velvatone Talking Machine Co. and, therefore, no judgment could be rendered under the statement of claim against the defendant Bartholomae. This contention was in no way pointed out on the trial. Moreover, this was a case of the fourth class, where the case is what the evidence makes it. Edgerton v. C.R.I. & P. Ry., 240 Ill. 311. Nor is there any merit in the contention that even if the agreement be construed to be in writing, it was within sec. 1 of the Statute of Frauds, because it was not signed by the party to be charged. The contract in question was not required to be in writing. Bartholomae did not by it agree to pay the debt of the Velvatone Talking Machine Co., but he agreed personally to pay plaintiffs for their services and disbursements as an obligation of his own.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

406 - 29823

PEOPLE OF THE STATE OF ILLINOIS, ex rel CARRIE JASAVICK,

Appellee,

v.

JOHN ADOMAITIS,

Appellant.

239 I.A. 652

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Carrie Jasavick, an unmarried woman, on the 30th of April, 1924, filed a complaint under the Bastardy Act in the Municipal Court of Chicago, alleging that on the 15th day of April, 1924, she was delivered of a male child and that the defendant, John Adomaitis, was the father of the child. The case went to trial on the 20th of May, 1924, when the defendant signed a jury waiver, entered a plea of not guilty, and the cause was tried before the court without a jury, and after hearing the evidence the court found the facts as alleged in the complaint, and the defendant was adjudged to pay $1100.00 for the support, maintenance and education of the child according to the provisions of the statute.

The record discloses that at the time of the alleged illicit relation between the relatrix and the defendant, July 4, 1923, she was about 39 years of age and the defendant 18 years. Since there must be a re-trial of the case, we will refrain from discussing the evidence in

Opinion filed Oct. 28, 1959.

detail and will only refer to so much of it as we deem necessary in giving the reasons for the conclusion we have reached.

The relatrix testified that there was but one act of sexual intercourse between herself and the defendant and this took place about eight o'clock on July 4, 1923. She was corroborated by her mother. The child was born on the 15th of April, 1924. On the trial the defendant offered evidence tending to show that the relatrix had been intimate with other men prior to July 4, 1923, and during the period of gestation, some of which evidence was erroneously excluded. In the case of Pike v. People, 34 Ill. App. 113, another division of this court said: "Medical writers of the highest celebrity and authority agree, and the fact is well established, that pregnancy is a condition which may exceed the nominal limit for its duration; but the actual limit to this excess, cannot, in the present state of physiological science be accurately known. Approximately, its duration may be stated from 260 to 308 days after coition and the average or usual period as 276 days. Chap. 3, Wharton and Stillis, Vol. 2, p. 1, Med. Juris., 3rd edition, tables and authorities there cited." In Vol. 3 of Words and Phrases, it is said, "The 'period of gestation' may be safely stated as a general proposition at from 252 to 285 days. 'Allowing the greatest latitude of inquiry, I think it should be confined to a period of time between the lowest period of time above stated and that of 300 days before the birth of the child."

There is no evidence in the record as to the period of gestation, but we will take judicial notice that the period

is approximately as appears from the foregoing authorities. It is apparent from an examination of the record that the court unduly hampered the defendant by excluding evidence which he offered. An instance of this character may be pointed out when a witness for the defendant testified that she had seen men climbing through the relatrix' window sometime in the month of May and continuing after that time on - "That was sometime in May and after that time continued all the time." This on motion of the States Attorney was stricken and was clearly erroneous, because it had tendency to show that the relatrix was having illicit relation with other men almost immediately prior to July 4, 1923. We think, however, we ought to say that the facts were not well brought out by counsel for either side. On a re-trial of the case all of the pertinent facts should be made to appear from the evidence.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

415 - 29832

PEOPLE OF THE STATE OF ILLINOIS ex rel JOSEPHINE TONINE,

Appellee,

v.

KENNETH BALL,

Appellant.

239 I.A. 653

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Josephine Tonine filed a complaint in the Municipal Court of Chicago and afterwards filed an amended complaint wherein she set up that on the 6th of May, 1924, she was delivered of a male child, which child by law would be deemed a bastard; that at the time she was so delivered she was an unmarried woman, and that the defendant, Kenneth Ball, was the father of the child. The defendant was arrested on a warrant and he entered into a recognizance in the sum of $2,000.00 for his appearance. The case came on for trial on July 7, 1924, when the defendant in writing waived a jury and the matter was submitted to the court. After a hearing the court found that Josephine Tonine on the 6th day of May, 1924, was delivered of a child, born alive and that the defendant was its father, and he was condemned to pay $1100.00 for the support, maintenance and education of the child in accordance with the provisions of the statute. From the judgment he prosecutes this appeal.

The only point made by the defendant in this court

Opinion filed Oct. 28, 1938.

is that the common law record fails to show the entry of a plea and, therefore, his motion in arrest of judgment should have been sustained. In support of this counsel cites the cases of Yundt v. People, 65 Ill. 372; People v. Excell, 155 Ill. App. 398. These two cases were criminal cases and are not in point, since it has been repeatedly held that a proceeding under the Bastardy Act is a civil and not a criminal proceeding. The other case which is cited on behalf of the defendant is People v. Woodside, 72 Ill. 408. That was a proceeding under the Bastardy Act and the court there held that the record disclosed that the defendant had entered a plea of not guilty to the complaint which had been filed against him and said "while the issue thus made up is not as formal as it might be, we regard it as sufficient."

In the instant case the record discloses that at the beginning of the trial before the Municipal Court of Chicago, the defendant was represented by counsel, and the court before any evidence was introduced, inquired of the defendant what his plea was and in response to that inquiry counsel for the defendant said the plea of the defendant was "not guilty". We think this was sufficient. The record further discloses that the defendant through his counsel took part in the trial by examining and crossexamining witnesses; that witnesses were called by the defendant and he testified in his own behalf, and although no point is made that the finding of the learned trial judge was not in accordance with the evidence, we think we ought to say, we have read the

evidence and are clearly of the opinion that the finding of the court was fully warranted by the evidence. The technical rule, applicable in criminal cases that requires the record to show a plea on behalf of the defendant, although he takes part and contests the matter on its merits, is not applicable to a proceeding under the Bastardy Act.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

424 - 29041

LOUIS FREY,
Appellee,

v.

LEVITAN LUMBER CO.,
a corp.,
Appellant.

239 I.A. 653

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant to recover the value of certain real estate bonds of the par value of $1600.00 and also $469.10 in money, which she claimed she had delivered to the defendant and that it had neglected and refused to return. During the trial of the case defendant tendered to plaintiff bonds of the par value of $700.00, which were accepted by her. She then contended that the defendant still retained bonds of the par value of $300.00 and the $469.10 in money and the jury returned a verdict in her favor for the amount she then claimed $769.10, upon which the court entered a judgment and the defendant prosecutes this appeal.

Plaintiff gave testimony to the effect that in October, 1921, she had an advertisement in a newspaper for a carpenter to build her a house; that in response to the advertisement, one Passow, called at her home; that at that time one S. L. Meyers was also at her home; that she told Passow that she would not employ him to build the house;

239 I.A. 573

that she talked to Meyers about the house and of the fact that she owned certain real estate bonds and Passow overheard the conversation; that shortly thereafter Passow called on her again and advised her that the defendant lumber company might buy her bonds from her; that afterwards she went with Passow to the lumber company's office with some of the bonds and that the representative of the lumber company stated they might buy them from her; that later she again called with some of the bonds and exhibited $1700.00 par value of them to H. R. Preskill, Vice President of the Lumber Company; that Preskill took the bonds and the $469.10; that she told him that she did not want to buy any lumber; that he then returned one bond of the value of $100.00 and gave $600 worth of the bonds to Passow and kept bonds of the par value of $900.00 over her objection and protest; that he told her he would give her a receipt for the bonds, and she came the next day to get them together with her money; that he thereupon gave her what she called a receipt and the next day again called for her bonds and money, but Preskill refused to give them to her, and afterwards she called a number of times and made demand on him for the bonds and money, but each time the demand was met with a refusal. She further testified that Passow returned to her, bonds of the par value of $600.00 so that defendant, according to her testimony, had received bonds of the par value of $1,000.00 and the $469.10 which it received and refused to deliver up to her. And, as above stated during the trial, the defendant delivered up $700.00 of the bonds which it claimed was all of the bonds received from her.

Preskill testified that plaintiff came to the office with Passow and it was stated that she wantedto buy lumber with which to build a house; that Passow gave an itemized list of the lumber required and that plaintiff informed him that she had real estate bonds which she desired to turn in in part payment for the lumber; that he inquired of a banker as to the selling price of the bonds and informed plaintiff of this fact; that he then agreed to take the bonds for the amount they were selling in part payment of the lumber; that the price of the lumber was $1148.23; that plaintiff objected to the fact that she was not getting the face value of the bonds and, thereupon, he allowed her a discount of $28.23, leaving $1120.00 net amount which plaintiff was to pay for the lumber; that, in payment of this, plaintiff delivered to him five bonds for $100.00 each on the State-Lake Building, two bonds of $100.00 each on the Morrison Hotel, together with $469.10, which, taken at the price the bonds were selling for, amounted to $1120.00; that, upon receipt of the bonds and the money from plaintiff, he receipted the lumber bill and delivered it to her; that plaintiff advised him to deliver the lumber as directed by Passow; that Passow gave directions for the delivery of a load of lumber which the defendant delivered, being about $130.00 worth; that delivery was made a few days after November 15, 1921, the day on which plaintiff purchased and paid for the lumber; that a day or two after the delivery of this load, plaintiff came to the defendant's place of business and told him not to deliver any more lumber; that she was not going to take the balance of the order and demanded the return of

her bonds and money; that he told her that if she would pay for the amount of the lumber already delivered and the profit defendant was to make on the order being about 15 percent of the balance of the order, he would return her bonds and money, less that amount, but that she refused this proposition.

The receipt which plaintiff testified was given to her on November 15th, which she says was the receipt for the bonds and money was produced on the trial by plaintiff. Although she was 78 years old, the testimony indicates that she understood what she was testifying about. This receipt consists of three pages, on the printed bill head of the defendant lumber company. Each page contains several items of lumber, giving the number of pieces, sizes, lengths and other details of description and, at the bottom of the third page, appears the selling price of the lumber. After allowing the discount as above stated of $38.33, as against this, there is credited -

$500	Bond	State-Lake @	$95.38	$469.90
200	"	Morrison	87.00	174.00
		Cash		469.10
				$1130.00.

Plaintiff testified that she could write and had read this receipt and had retained it all the time from its date until the trial, and it is perfectly obvious, even from her own testimony that she was purchasing lumber from the defendant and not delivering bonds and money to it. She testified that she advertised for a carpenter to build her house; that Passow came to seeher in response to the advertisement and talked about building the house; that she after-

wards went with Passow to the Lumber Company. An inspection of the receipt which she says she obtained from the defendant clearly shows that the defendant's version of the matter as to the sale and purchase of lumber is proven by the overwhelming weight of the evidence and the verdict of the jury to the contrary is against the manifest weight of the evidence and must be set aside by this court. We must not be understood as intimating that defendant has returned to plaintiff all of the bonds which he received. We do not pass upon that question at all.

The verdict being against the manifest weight of the evidence, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

448 - 29863

STANDARD TRADING CO., a corp.,
Appellee,

v.

ELIA LEVY,
Appellant.

239 I.A. 653

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $507.75. To its statement of claim the defendant filed an affidavit of merits which, on motion of plaintiff, was stricken. The defendant was, thereupon, defaulted and judgment entered on plaintiff's statement of claim for $507.75 and this appeal followed.

Plaintiff in its statement of claim alleged that its claim was for money due and owing it for the purchase price of goods sold and delivered by the Lerner Shirt Company to the defendant at the latter's request. It further set up that Plaintiff was the "bona fide assignee of the above account for value", and that the assignment was made by the Lerner Shirt Company to the plaintiff on October 13, 1923. It was further alleged that plaintiff on October 13, 1923, notified the defendant that it was the bona fide assignee for value of the account; that defendant acknowledged receipt of the notice and agreed to pay plaintiff

direct; that such acknowledgment was in writing and signed by the defendant. Plaintiff further alleged that although it had often requested payment the defendant had refused and neglected it. Attached to the statement of claim was a printed affidavit of claim in which an agent of plaintiff's swore that he had knowledge of the facts and that "the said cause is a suit upon contract for the payment of money; that the nature of plaintiff's demand is as stated and that there is due plaintiff from the defendant, after allowing to the defendant all his just credits, deductions and setoffs the sum of $507.75."

The defendant in its affidavit of merits set up, in substance, that one Harry Engel had brought suit in chancery against the defendant and others in the Circuit Court of Cook County on the 23nd of October, 1923, and in that proceeding the defendant was restrained from paying over to Jack Lerner, doing business as the Lerner Shirt Company or to his assignee, who is the plaintiff in the instant case, $507.75. The affidavit of merits further set up that in the chancery case a decree was entered on the 7th of February, 1924, whereby the defendant was ordered to pay the $507.75 to the clerk of the Circuit Court; that the chancellor found that the assignment sued on in the instant case was null and void as shown by a decree of the Circuit Court, which was attached to and made a part of the affidavit of merits. It was further set up in the affidavit of merits that the defendant, Levy, had paid the money to the clerk of the court as ordered by the decree. In the decree, which is made a part of the affidavit of merits, the chancellor found inter

claim that the defendant, Levy, owed Jack Lerner, doing business as the Lerner Shirt Co.,$507.75. It further found that Jack Lerner with the intent of defrauding complainant in that case, assigned its claim against the defendant, Levy, to Lerner's friends and it was further found that the assignment was null and void.

The learned judge in the instant case held that since the assignment to plaintiff by Lerner was prior to the injunction suit in the Circuit Court and since plaintiff was not a party to that proceeding, he was not bound by the decree. It is obvious that since plaintiff was not a party to the proceedings in the Circuit Court, he was in no way affected by the decree entered and the learned trial judge's ruling was correct in this respect.

The defendant contends that plaintiff's statement of claim does not state a cause of action and, therefore, is insufficient to support the judgment. This court has repeatedly held that a statement of claim in the Municipal Court does not need to state a cause of action where the case is heard on its merits and the evidence shows that plaintiff is entitled to recover. McGlynn v. Gillespie, 237 Ill. App. 400. But this rule does not apply where the case is not heard on its merits, but where the defendant is defaulted for want of an affidavit of merits. Emberg v. City of Chicago, 271 Ill. 404. In such a case the statement of claim must state a cause of action. The judgment being by default, plaintiff's statement of claim must state a cause of action and we think it does. It is set up that plaintiff's claim was for the purchase price of goods, wares

and merchandise, sold and delivered by the Lerner Shirt Company to the defendant; that the quantities and prices were as set forth and that plaintiff was the bona fide assignee and the date on which it became such assignee. It further sets up that plaintiff notified the defendant of the assignment and the latter agreed to pay the money direct to plaintiff. We think the statement of claim was sufficient.

The defendant further contends that to sustain a judgment by default plaintiff's statement of claim must be verified and that the verification of it is insufficient, because no where does it appear in the affidavit attached to the plaintiff's statement of claim, how plaintiff acquired title to the claim held against the defendant by the Lerner Shirt Company, as required by Sec. 18 of the Practice Act; that plaintiff simply took the stock form of affidavit where plaintiff is suing defendant directly and not as assignee of a claim against the defendant. The affidavit attached to plaintiff's statement of claim sets up 'that the said cause is a suit upon a contract for the payment of money; that the nature of plaintiff's demand is as stated.' In the instant case it is obvious that if the judgment is sustained, the defendant will be required to pay the amount twice, he having already paid it in accordance with the decree of the chancery court, and with this in view we think we ought to require plaintiff to fully comply with the provisions of Sec. 18 of the Practice Act. No where is it stated in the affidavit of plaintiff's statement of claim how plaintiff acquired title to the Lerner claim against the

defendant. Illinois Midland Ry. Co. v. Farmers State Bank, 200 Ill. App. 591. The statement of claim being improperly verified is insufficient to support the judgment.

The defendant does not specifically set up in its affidavit of merits any facts that show that the assignment was null and void. If it did so its affidavit would be sufficient and plaintiff then would be required to prove that it was the equitable and bona fide owner of the claim, and if the proof failed to show this or if the proof showed that the assignment was fraudulent, it could not recover. The issue could then be tried out in the Municipal Court. And we think the fact that the decree of the Circuit Court, which is attached and made a part of the affidavit of merits and which finds that the assignment was fraudulent is hardly a sufficient allegation of this alleged fact. We have examined the other points made by the defendant, but they are without merit.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

476 - 39693

FRANK SEELEY,

Appellee,

v.

SOUTH PARK COMMISSIONERS, a corp.,

Appellant.

239 I.A. 653

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover damages sustained by him in repairing his automobile which collided with a safety island constructed in one of the streets under the control of the defendant. The trial was before the court without a jury; there was a finding and judgment in plaintiff's favor for $200.00 and the defendant appeals. The defendant contends that the judgment is wrong and should be reversed because (1) it is not liable for the negligence of its servants and (2) the evidence discloses that the defendant had no notice prior to the accident that the light on the safety island was out of repair. In support of the first point defendant cites Backer v. West Chicago Park Commissioners, 66 Ill. App. 507; Devine v. South Park Commissioners, 183 Ill. App. 402 and other cases. Since there is no brief filed on behalf of the plaintiff, we will not pass on this point, because the judgment must be reversed on the ground that the second point made by the defendant is well taken.

2393 A. 658

Opinion filed Oct. 28, 1925.

The evidence shows that, after dark on the evening of February 1, 1934, plaintiff, while driving his automobile in Jackson Park, ran into a lamp post or safety island, located at the intersection of 59th street and another driveway in the park; that there was no light in the post at the time to warn drivers; that as a result of the accident he was required to pay $200.00 in repairing his car. There is no dispute of plaintiff's evidence in this respect, but one of defendant's police officers testified that he was at the safety island where the accident happened a minute or two before the accident and that the light was burning at that time; that he walked away about 130 to 150 feet and had just started back when he heard the crash of the automobile against the post. This evidence is undisputed and under the law, it is well established that in no event could the Park Commissioners be held liable for the failure of the lamp to be burning on the island, where the only evidence in the record is that they did not know that it was out of repair and had no opportunity to ascertain this fact. Under the evidence in the record, even if it be held that the defendant might be liable for the repairs in question as a matter of law, no recovery could be had unless the defendants knew or ought to have known that the lamp was defective, or out of repair. And since the uncontradicted evidence is that the lamp was burning a minute or two before the accident, and apparently in good condition, no negligence can be inferred from the fact that the light went out.

The judgment of the Municipal Court of Chicago is reversed.

THOMSON, P.J. AND TAYLOR, J. CONCUR. REVERSED.

JAMES CONRAN,
Appellee,

v.

HELEN HUTCHINS,
Appellant.

239 I.A. 654

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $85.00, claimed as damages sustained by him in the repairing of his automobile, which was negligently struck and damaged by defendant's automobile. The case was tried before the court without a jury, there was a finding and judgment in plaintiff's favor for the amount of his claim and the defendant appeals.

It appears from the evidence that plaintiff on November 8, 1923, was driving his automobile in a public street in the City of Chicago and his automobile was struck and damaged by an automobile belonging to defendant and which was being driven by one Ivan Alfirebich. The contention of the defendant is that the judgment is wrong and should be reversed because the undisputed evidence is that defendant's automobile at the time in question was being driven by Alfirebich on his own business and not on the business of the defendant. After the plaintiff had made out its case, Alfirebich, on behalf of the defendant,

Opinion filed Oct. 28, 1975.

took the stand and testified that he lived in the same house with the defendant on West Monroe street; that he was driving the defendant's automobile at the time of the accident; that he was a journalist and did some real estate business; that he had known the defendant for eight years; that he had the keys for the automobile and always used the car; that the defendant never drove the car; that he drove the car when she went out in it; that after the collision he did not give his name to the plaintiff; that he was not the defendant's chauffeur, but that he bought the car and paid for it "and I put it under her name"; that he paid for the license which was in the defendant's name; that it was her car.

The evidence further shows that at the time of the collision plaintiff obtained the license number on the car and traced the ownership of it through that means; that a few days afterwards he called at the defendant's home in reference to the matter, but she refused to talk to him. In these circumstances, we would not be warranted in holding that the finding of the trial judge who saw and heard the witnesses, was against the manifest weight of the evidence. The court was not required to believe the testimony of the witness Mirebich, although it was not specifically denied, when all the facts and circumstances are taken into consideration.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

121 - 23941

LOUIS COHN,

Defendant in Error,

v.

NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, a corp.,

Plaintiff in Error.

239 I.A. 654

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On April 14, 1921, plaintiff brought suit against the defendant, seeking to recover $1,000.00 which he claimed was due him under a policy of insurance issued to him by the defendant. The defendant was served and on the 20th of April, 1921, entered its appearance and demanded a trial by jury. Afterwards it filed its affidavit of merits. The case was then placed upon the short cause calendar and on September 26th, 1921, on motion of the plaintiff, it was withdrawn from the short cause calendar and placed on the next jury calendar. On January 10, 1923, the case was reached in its regular order for trial. The defendant did not appear in court. The plaintiff was in court and the cause was submitted to the court for trial without a jury. The court after hearing evidence, found the issues against the defendant and assessed the plaintiff's damages at the sum of $1,000.00. Judgment was entered on the finding. After the lapse of more than thirty days the defendant learned of the entry of the judgment and filed its

Opinion filed Oct. 28, 1938.

petition under Section 21 of the Municipal Court Act, praying that the judgment be vacated and set aside, and on March 30, 1933, the prayer of defendant's petition was granted, the judgment set aside and vacated and the plaintiff appealed to this court, where, upon consideration of the record, the order of the Municipal Court vacating the judgment was set aside.

Afterwards the defendant sued out this writ of error which was made a supersedeas, and it now makes the point that it was error for the trial judge to hear the case without a jury, since there was a demand for a jury trial by the defendant at the time it entered its appearance. We think the point must be sustained. A jury having been demanded the court was without power to hear the case without the intervention of a jury.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

156 - 30002

F. M. PAIST COMPANY, a corp.,

Appellant,

v.

WM. LAGOCKI,

Appellee.

239 I.A. 654

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On May 3, 1924, plaintiff brought an action of the fourth class against the defendant, claiming there was due it for goods, wares and merchandise sold and delivered to the defendant $152.35. Summons issued returnable May 14th and was served by the bailiff May 8, 1924. On May 14th the defendant failed to appear, he was defaulted and judgment entered in plaintiff's favor for the amount of its claim. July 23rd following the defendant made a motion to vacate the default and judgment; the motion was sustained and, thereupon, the cause was set for hearing August 18th. On that day the cause was regularly called, plaintiff refused to proceed, its suit was dismissed and this appeal followed.

The record discloses that when defendant's motion to vacate the default and judgment came on for hearing on July 23rd, he supported it by a petition and an affidavit, seeking to bring himself within the provisions of section 21 of the Municipal Court Act, which permits the vacation of a judgment after the lapse of thirty days after the entry

Opinion filed Oct. 28, 1958.

of the judgment. In defendant's petition he set up that on May 9th, being the day after he was served with summons he called upon plaintiff's attorney and informed him that he did not owe the amount claimed in plaintiff's statement of claim and that the attorney then informed the defendant that there had been a mistake in bringing the suit; that the defendant should disregard the summons and not appear in court and that the suit would be dismissed; and, therefore, he did not appear on the return day. The petition further set up that the goods mentioned in plaintiff's statement of claim were never delivered to him and that he believed there was a mistake as to the identity of the party to whom the goods were delivered by plaintiff. He further set up that defendant had no notice of default and judgment until five days after it was entered, viz. May 18th, when he telephoned plaintiff's attorney and asked the latter why he had been served with an execution; that the attorney advised him over the telephone to disregard the execution "as there would be nothing to it"; that several days afterwards an execution was levied on some of his property by the bailiff of the Municipal Court and that the matter was still pending. In support of his petition he also filed an affidavit wherein he sets up that on the 12th of May the attorney for plaintiff called on the defendant at the latter's store on West 51st street and informed the defendant that there was a mistake and promised to dismiss the suit. Plaintiff's attorney filed a counter affidavit, in which he swears that he never saw the defendant or talked with him until after the judgment was rendered and the execution served on the defendant; that about fifteen days after the bailiff made a demand for pay-

ment under the execution, he called upon the defendant and asked him what he was going to do about payment, to which the defendant replied that he had given the execution to his lawyer, mentioning the name of the lawyer, but counsel for plaintiff was unable to recall the lawyer's name. The affidavit further sets up that plaintiff's counsel at no time told the defendant to disregard the execution, but that he waited about forty days to give the attorney for the defendant "time to come in on motion, if he so desired, before he ordered a levy."

We think the court should not have set aside the default and judgment, because the petition and affidavit of the defendant were entirely insufficient. It did not show diligence, but, on the contrary, it showed that the defendant was negligent, and it has many times been decided by this court and by the Supreme Court, that before a judgment in such case may be vacated, the defendant must show not only that he has a meritorious defense, but that he has not been guilty of negligence.

In the instant case plaintiff was served with summons on the 8th day of May, returnable on the 14th of May. He states that on the day following service, May 9th, he called upon the attorney for plaintiff and advised him that there was a mistake that he did not owe the bill, to which the attorney for plaintiff replied, that he would dismiss the suit and to pay no further attention to it. On May 19th, five days later, after judgment had been entered, the bailiff made a demand under the execution on the defendant for payment and again he telephoned the attorney for

plaintiff and the latter told him to disregard the execution. These facts are all denied by the attorney for the plaintiff. In the case of American Surety Co. of N.Y. v. Bliss, 214 Ill. App. 463, where a judgment of the Municipal Court was set aside after the expiration of thirty days, it was said (p.466) "Judgments will not usually be set aside upon charges of broken oral agreements, long after the expiration of the period of time for so doing specified in the statute, where such charges are directly denied and where it is apparent that the rights of one complaining thereof might easily have been protected by a written stipulation of counsel." And again this court in the case of Gaska v. Shimek, No. 29231, Ill. App. Court, First District, in passing upon a somewhat similar question, said: "It would tend to disrupt all rules of practice if the defendant could ignore a summons and at a remote subsequent term of court have a judgment set aside by merely making an affidavit that the plaintiff had told defendant that he need not worry as the suit would not be prosecuted. Regardless of what plaintiff had said, it was the duty of defendant to respond to the summons to appear in court and to take proper steps to defend the action brought against him."

The judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to set aside its order entered July 3rd, vacating and setting aside the judgment, and also its judgment of dismissal entered on September 18, 1934.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

169 - 30018

AUGUSTA KUHEM,
Defendant in Error,

v.

JOEL PRENTICE,
Defendant Below,

v.

MRS. JOHN LAMBERT, Garnishee,
Plaintiff in Error.

239 I.A. 654

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opimion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On May 16th, 1924, judgment by confession was entered in favor of plaintiff against Prentice in the sum of $2050.50. Four days later an execution was issued and returned the same day, the return of the bailiff showing that the defendant was not found, and on the same day plaintiff filed an affidavit for garnishment summons in which "Mrs. Lambert" was named as garnishee. Garnishee summons was issued on May 20, returnable May 26th at 9:30 o'clock A.M. On the same day plaintiff filed written interrogatories to be answered by the garnishee. June 3rd an order was entered by the Municipal Court defaulting "Mrs. John Lambert" for want of appearance. A conditional judgment was entered against her and it was ordered that a writ of scire facias issue against the garnishee, commanding her to show cause why the conditional judgment should not be made final. The

Opinion Filed Oct. 28, 1958.

next day, June 4th, a writ of scire facias issued returnable June 9th and was served on Mrs. Lambert June 5th. June 17th the Municipal Court entered an order defaulting the garnishee "Mrs. John Lambert" and the conditional judgment was made final as of June 3, 1924. On July 11th following Mrs. Lambert filed her petition asking that the judgment rendered against her be vacated and that she be allowed to defend. The matter was continued to July 24th. The next order appearing in the record was entered August 22nd in which the garnishee's motion to vacate the judgment was denied. The defendant did not except or pray an appeal, nor ask leave to file a bill of exceptions. Nothing further appears to have been done until February 17th, 1925, when the garnishee sued out a writ of error from this court.

The garnishee in her petition filed July 11th set up that on the 17th of June, 1924, judgment was entered against her for $2050.50 and costs; that four days later, June 21st, an execution was issued on the judgment, which was served on her June 25th by the bailiff of the Municipal Court. The petition further set up that prior to the entry of the judgment, she was served with a garnishment summons returnable June 3rd at 9:30 o'clock in the morning at room 312 City Hall; that she appeared at that time and place, but did not hear her name called and, therefore, left the court room; that later she was served with a writ of scire facias returnable to the same court June 17th at 9:30 o'clock in the morning; that she again attended court at that time and place, but was told by one John Doe that the case had been continued to a later date and that she would be notified of the

exact date to which the case had been continued; that she remained in the court until there had been a call of all the cases, but did not hear her name called and then left the court room; that the first knowledge she received that judgment had been entered against her was on the 25th of June, when the deputy bailiff served the execution on her.

She further set up that she had a good defense to the suit upon its merits; that she was not and had not at any time since or at the time of the service of the garnishment summons been indebted to Prentice in any sum whatsoever, and did not have any property belonging to him; that she was unfamiliar with the practice of the Municipal Court or any other court and, as she was not indebted to Prentice, she did not deem it necessary to employ counsel.

The garnishee contends that the Municipal Court had no jurisdiction of the garnishment proceedings, because the affidavit for the garnishment summons did not state that it was made by a "credible person" as required by sec. 1 of chap. 62 of the revised statutes. That section provides that an affidavit in such case be made by the plaintiff or other "credible person". We think there is no merit in this contention. It certainly would add nothing to the affidavit to have the person making it, swear that he was a credible person. It is further contended that the affidavit is insufficient, because it states that the judgment in the original proceeding was in favor of August Kunde, while the record discloses that the judgment was in favor of Augusta Kunde. We think the point is not well taken, because the

garnishee in her petition names the usee in that case as Augusta Kunde. She was in no way affected by the erroneous spelling of the christian name of the usee. A further point made is that the writ of scire facias was insufficient to authorize the court to proceed in that the return of the bailiff is that it was served on the garnishee, "This 5th day of June 19" and that this is no date at all. But it is apparent from the garbishee's own petition that she was properly served with the garnishment summons, because she there swears that prior to the entry of the judgment she was served with garnishment summons, and, thereafter, she was served with a writ of scire facias, which was returnable on the 17th day of June and that she attended court in response to the writ of scire facias. Her sworn petition, therefore, shows that her interests were in no way affected by the date of the return and that she voluntarily went into court when she filed her petition asking that the judgment be vacated, so that any error in this respect was waived. It is further stated that the record discloses that there was a conditional judgment entered against her - a "Mrs. John Lainbert", but that the writ of scire facias and final judgment ran against "Mrs. John Lainbert." This is a misapprehension. The record discloses that the conditional judgment was entered against "Mrs. John Lambert." The garnishee in her petition, seeking to have the judgment vacated, makes no point that the names were incorrectly spelled either of herself or of the usee, nor as to the fact that the return of the writ of scire facias bore no date, but on the contrary, she treats them as being in every

respect correct. Her only complaint being that when she attended court in response to the garnishment summons she did not hear her case called and later in response to the writ of scire facias, she was informed by someone in the court room that the case had been continued to a later date and that she would be advised of this later. There is no merit in the contentions made by the garnishee.

She further contends that the court should have set aside and vacated the judgment in accordance with the prayer of her petition, which was filed within thirty days after the final judgment against her, because the petition shows that she had a meritorious defense; that she did not owe Prentice any money; and that she attended court ready to show this fact, but was misled by her case not being called. If we assume that the garnishee's petition is properly before us, we think it clear that she was guilty of negligence in protecting her rights. For in her petition she swears that she was served with garnishment summons; that in response to the summons she appeared in court but did not hear her name called; that later she was served with a writ of scire facias, which was returnable on the 17th of June; that she again attended court and was informed by some person that her case had been continued to a later date and that she would be notified of the exact date. Moreover, the garnishment summons as shown by the record was not returnable on the 3rd day of June, as the garnishee swears in her petition, but was returnable on the 26th of May. Nor was the writ of scire facias returnable June 17th as she swears, but it shows upon its face that it was returnable June 9th. It might well be that the trial judge noticed these dis-

crepancies and took them into consideration in passing upon the garnishee's petition. We think from the garnishee's petition, it appears that she was negligent in protecting her rights when she had been on two occasions summoned, and, therefore, we cannot say that the learned trial judge, in overruling her motion, abused his judicial discretion.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P. J. AND TAYLOR, J. CONCUR.

194 - 30048

JOSEPH RINNELLA AND LEO RINNELLA, doing business as RINNELLA BROTHERS, for the use of SAM FULLANO,

Appellees,

v.

FORT DEARBORN FIRE UNDERWRITERS OF CHICAGO, a corporation,

Appellant.

239 I.A. 654

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

A judgment by confession for $2662.50 was entered by the Municipal Court of Chicago in favor of Sam Fullano against Joseph and Leo Rinnella. An execution was issued and returned wholly unsatisfied and afterwards the Fort Dearborn Fire Underwriters of Chicago was brought in as garnishee on the ground that they owed the Rinnella brothers under a fire insurance policy issued to them. The case was tried before the court without a jury and there was a finding and judgment for $1393.85, and the garnishee prosecutes this appeal.

The record discloses that Joseph and Leo Rinnella were engaged in business and that their stock of goods was insured by the garnishee who had issued its policy to them in the sum of $2,000.00. Their goods were damaged by fire and it was claimed by them that the extent of their damage was more than $1393.85, the amount for which judgment was entered against the garnishee.

Opinion filed Oct. 28, 1925.

The only point made by the garnishee in this court is that the evidence was entirely insufficient to warrant the court in finding the amount of Rinnella Brothers' loss to be $1293.85; that there was no evidence upon which to base such a finding; that the evidence shows that the amount of the loss sustained by Rinnella Brothers on account of the fire was speculative and conjectural; and that the evidence did not show the actual cash value of the goods that were damaged by the fire.

The evidence tends to show that after the fire the garnishee sent out its adjuster to ascertain the extent of the loss; that he met with Rinnella and some of his employees and an adjuster representing Rinnella; that they checked over the goods that were damaged by the fire, and the garnishee's adjuster testified that after such checking over, he arrived at the figures of $1293.85 as the amount of the loss. The evidence further shows that the assured prepared his proof of loss for this amount and filed it with the garnishee. The witness, Feiler, who was the garnishee's adjuster and who was called by the plaintiff, testified as to how he arrived at the amount of the loss and it was not even suggested on the trial that this witness did not possess the requisite information or knowledge to enable him to arrive at the amount of the loss, therefore, the garnishee will not now be permitted for the first time in this court, as it seeks to do, to say that some expert should have been called to testify to the value of the several articles damaged or destroyed by the fire.

Feiler further testified that after the fire he

took the matter up of ascertaining the extent of the loss up with the assured and his representative, with the distinct understanding that the garnishee was not admitting any liability; that he went to the assured's place of business where the fire had occurred and proceeded to check the loss based on the inventory which took a couple hours of time; that he was not there to adjust the loss, but to ascertain the extent of the loss; that after such checking he found the amount of the loss, to be $1292.85. On cross-examination of this witness by counsel for the garnishee, he was asked whether the amount of the loss, $1292.85, was reached by the witness as a result of his independent check or whether such figures were given to him by the assured and he replied in the negative and said that the figures were his and were "arrived at after investigating the loss and ascertaining the values of the various items."

The evidence of this witness alone was sufficient to warrant the finding of the court. The witness was an adjuster for the garnishee and the court was fully warranted from his testimony in entering judgment for the amount of the loss as figured by its own adjuster.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

212 - 30065

MARSHALL SOLBERG,
Appellant,

v.

WILLIAM GAERTNER,
Appellee.

239 I.A. 655

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant seeking to recover $4,000.00 in payment of legal services which he claimed to have rendered the defendant. He filed his declaration to which was attached an affidavit of his claim. The defendant entered his appearance by his counsel and filed a plea of the general issue, but did not file any affidavit of merits and afterwards plaintiff without notice to the defendant procured an order to be entered defaulting the defendant for failure to file an affidavit of merits. Thereupon the court entered judgment in favor of the plaintiff, based upon his declaration and affidavit of claim. The defendant did not learn that a default and judgment had been entered against him until after the term at which the judgment was rendered, when he made a motion seeking to have the default and judgment vacated and set aside. The motion was in writing and apparently in support of it two affidavits were filed. Plaintiff demurred to the motion. The court struck the demurrer from the files, sustained the defendant's motion and vacated the default and judgment. To reverse this order

Opinion filed Oct. 28, 1952.

plaintiff prosecutes this appeal.

The defendant in making his motion to vacate and set aside the judgment, sought to bring himself within Sec. 89 of the Practice Act. Such proceeding is the beginning of a new suit and is independent of the proceeding in which the judgment sought to be set aside is rendered. Harris v. Chicago House Wrecking Co.,314 Ill. 500. The written motion filed is in the nature of a declaration and since this was demurred to, it raised the legal sufficiency of the written motion. Under such motion the trial court is authorized to correct errors of fact in the original proceeding which are not shown by the record, as "where the defendant, being a minor appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit or died before judgment, or for some error in the process, or through the default of the clerk" such facts being unknown to the court at the time the judgment was rendered. Marabia v. Thompson Hospital, 309 Ill. 147; Chapman v. North American Ins. Co., 293 Ill. 181. The question then arises, does the written motion contain any allegation which would bring it within the rule announced in the cases cited. We think it clear that it contains no such allegation. The motion set up five reasons why the judgment should be set aside and vacated as follows:

> (1) That the original cause did not appear on any trial call and that the defendant had no notice of plaintiff's motion for default and judgment; (2) that plaintiff's affidavit of the amount due him which was attached to his declaration, was a nullity and not in compliance with the statute; (3) that the said judgment was procured through fraud and imposition on this court; (4) that the plaintiff's declaration did not state such a cause of action as would entitle plaintiff to recover a judgment for legal services since it failed to show that plaintiff was a licensed

physical measurements being compared.

attorney; and (5) that the judgment was void because it attempted to deprive the defendant of his property without due process of law, contrary to certain provisions of the state and national constitutions.

None of these alleged grounds come within the purview of Section 89 and we think the motion is not materially aided, even if it were proper to consider the two affidavits filed by the defendant apparently in support of it. One of the affidavits was made by counsel for defendant in the original suit in which he swears that he had no notice of plaintiff's motion for a default and judgment until after the judgment term had passed; that it was the practice under the rules of the court "to give notice to opposing counsel of all motions to be made in a cause where his appearance is on file and no default had been entered against him." The other affidavit was made by the defendant which sets up facts tending to show that he had paid plaintiff in full for all legal services rendered. Even if it be assumed that the rule of court was violated by plaintiff in failing to give notice, it would not constitute such an error of fact as would warrant the court in vacating the judgment under Section 89. As said by the Supreme Court in passing on a similar question in Cramer v. Commercial Men's Assn., 260 Ill. 516 (p.532) "The error in fact which may be assigned under the motion must be some fact unknown to the court which, if known, would have precluded the rendition of the judgment. The rules were of record in the court and must necessarily have been of record to have any validity. * * * Courts take judicial notice of their own records * * * and the

records are always constructively before the court. Under the well settled law these rules were before the court and judicially known when the orders were made and the judgment entered, and could not, therefore, be made known to the court as errors in fact of which the court was ignorant." The alleged insufficiency of plaintiff's affidavit of claim attached to his declaration could not be considered on defendant's motion. Marabia v. Thompson Hospital and Harris v. Chicago House Wrecking Co., supra. Moreover, if the affidavit was a nullity as the defendant contends, this would be determined as a question of law and not one of fact and clearly not within section 89. The charge made in the motion that the judgment was procured through fraud and imposition on the court is but a general charge, no facts being stated and the fourth ground raises the question of the sufficiency of the declaration, which cannot be done in this proceeding as held in the Harris and Marabia cases. The fifth ground mentioned in the motion is that the defendant's constitutional rights were violated and its property taken without due process of law, contrary to the state and national constitutions. We have no jurisdiction to pass on such questions and they are waived by the defendant bringing the case to this court.

The record further shows that after the court had sustained the defendant's motion and vacated the default and judgment and after plaintiff had prayed an appeal to this court and filed his bond with this court, the court entered an order correcting the judgment so as to show that in entering the judgment against the defendant, it did not

hear any evidence, but only considered plaintiff's affidavit of claim, and there is considerable argument in the brief by counsel for plaintiff that this was unauthorized. We think this question merely a moot question, since plaintiff in his brief states that the court assessed the damages not upon consideration of any evidence, but upon plaintiff's affidavit attached to his declaration.

If there are errors in the record, as the defendant contends, his remedy is by writ of error, where upon review in such case the entire record may be searched. Ellsuth v. Ellsuth, 250 Ill. 314; Drummer Creek Dist. v. Roth, 244 Ill. 68.

The order of the Superior Court of Cook County is reversed with directions to set aside the order vacating the default and judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

FRANK OLENEK, by John Olenec, his next friend,

Appellee,

v.

AMBER FURNITURE CO., a corporation,

Appellant.

239 I.A. 655

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff by his next friend brought suit against the defendant to recover $357.00 which he had paid the defendant on account of the purchase price of household furniture purchased from the defendant. Plaintiff's theory was that when he entered into the contract for the purchase of the furniture, he was a minor and that he was also a minor at the time he disaffirmed the contract and at the time he brought suit. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of his claim.

The record discloses that on January 27, 1923, plaintiff together with his wife called at the defendant's place of business in Chicago, the defendant being engaged in selling at retail household furniture, and purchased furniture, agreeing to pay therefor $708.75. He gave his note which was payable in installments for that amount to the defendant and executed a chattel mortgage on the furniture. By agreement the furniture was left in the possession of the

defendant and placed in one of its storage houses to be delivered to plaintiff when he had paid for it in full. He paid $30.00 in cash and subsequently made small payments up until May 24, 1924, at which time the total amount of payments aggregated $357.00. About July 1, 1924, he demanded the return of his money, advising the defendant that he did not want the furniture. The demand was refused and the following month plaintiff brought suit.

The only substantial matter in controversy on the trial and in this court is as to the plaintiff's age. He offered evidence tending to show that he was born September 2, 1903 and therefore, would not attain his majority until September, 1924, while the defendant offered evidence to show that plaintiff was more than 21 years old prior to the time he made his last payments, viz., May 24, 1924. The contention of the defendant is that the finding of the trial judge to the effect that plaintiff had not attained his majority until after he had made his last payments is not shown by a preponderance of the evidence. Of course, the burden was on the plaintiff to prove by a preponderance of the evidence that he was not 21 years old until after he made his last payment. And before this court is authorized to disturb the finding of the trial court to this effect, we must say that such finding is against the manifest weight of the evidence.

Plaintiff testified that he was born in Chicago on September 2, 1903. His father also testified that he was born on that date and, while there is some confusion in the testimony of these two witnesses on this point, we think it clear that an examination of the record discloses that they both testified that plaintiff was born on September 2, 1903.

Plaintiff further offered in evidence the baptismal record kept by the parish church where plaintiff was baptized. This showed that plaintiff was baptized September 6, 1903 and it further gave the date of his birth as September 2, 1903. The defendant sought to discredit this evidence by showing that plaintiff made an application for a marriage license at Crown Point, Ind. on October 4, 1920, and there swore in answer to questions put to him by the clerk of the court that he was born September 6, 1898. The defendant also offered evidence showing that plaintiff made an application for registration as chauffeur to the Secretary of State of Illinois on March 17, 1924, and in such application swore that he was then 24 years of age. It also introduced in evidence a school register kept by one of the parochial schools in Chicago, which plaintiff attended when a small boy, and which showed that plaintiff was born September 7, 1903. Plaintiff's father testified that he had taken the plaintiff to this school on the opening day of school and gave information to the sister in charge as to the date of plaintiff's birth. This school register further showed that plaintiff left the school on September 21, 1916, and that he was then 14 years old.

Counsel for the defendant contend that the record kept by the parish church where plaintiff was baptized, was incompetent so far as it purported to show the date of plaintiff's birth, although it was competent for the purpose of showing the date of the baptism. The law is as contended by counsel. Bailey v. Brother of B. B. Trainmen, 311 Ill. 184. But we are also of the opinion that the point is not properly

before us. The witness who produced the church records and testified concerning the method of preserving them, testified that he had the record of births and baptisms for the year 1903, which contained the record of the birth and baptism of plaintiff. Counsel for the defendant then stated that he was willing to let plaintiff use the book, but under ordinary circumstances he had a right to object on the ground "that there was not sufficient foundation laid," but that he would not object if plaintiff would permit the introduction of records of a public school on the same subject which the defendant said he had. Plaintiff refused to agree to this. The court overruled the objection. The witness then read the contents of the record which showed that plaintiff was born September 2, 1903 and baptized September 6, 1903. He was cross-examined by counsel for the defendant at considerable length and when this was completed, counsel for plaintiff again examined the witness and no objection was made that the record was incompetent as tending to show the date of plaintiff's birth. Counsel having failed to point out why part of the record was not admissible, he cannot now complain. The most that can be said in favor of counsel's position is that he made a general objection, which was properly overruled, because it conceedes that the record was admissible for the purpose of showing the date of baptism. First Natl. Bank of Hayward, Wis. v. Berry, 198 Ill. App. 513.

Since the evidence was sufficient to warrant the court in finding that plaintiff was born September 2, 1903, and therefore, was not 21 years of age when he brought his suit for the recovery of the $357.00, and since we are unable to say that the finding of the trial judge to this effect is

against the manifest weight of the evidence, we cannot disturb the judgment. The trial judge saw the plaintiff and his father testify and was in a much better position to determine the truth of their testimony than we are from the mere reading of the testimony in the record.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

385 - 29803

MINNIE GIEBEL,
Appellee,

v.

FREDERICK W. RAHN; ET AL,
Appellants.

239 I.A. 655

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Oct. 28, 1935.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Minnie Giebel, having been injured, on June 14, 1920, by falling from a second story porch, owing to a defective railing, brought suit for personal injuries against the defendants, F. W. Rahn and Johanna Rahn, the joint owners of the property, and recovered a verdict and judgment in the sum of $1200.00. This appeal is therefrom.

The evidence, as to the occurrence itself, shows substantially the following:- F. W. Rahn and Johanna Rahn, husband and wife, were the owners of a two-story and attic frame residence at 4087 Narragansett avenue. They lived next door in a building about ten feet away from the one in question. At the rear of number 4087, which was a three flat building, leading up from the back yard to the second story and then to the attic story, there was a stairway. There was no basement to the building. The building, which was about 18 years old, faced west and the porches, each floor having one, and the stairway, were on the east side at the rear. The porch of the second floor was about eleven feet from the ground. Around it on the south and east sides

MINNIE GIEBEL,

Appellee,

v.

ZIMMERMAN V. KANE, ET AL,

Appellants.

COOK COUNTY,

CIRCUIT COURT,

APPEAL FROM

2393 A. 893

Opinion filed Oct. 28, 1938.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Minnie Giebel, having been injured on June 16, 1936, by falling from a second story porch, owning to a defective railing, brought suit for personal injuries against the defendants, Z. [illegible] Kane and Johanna Kane, the joint owners of the property, and recovered a verdict and judgment in the sum of $1900.00. This appeal is thereform.

The evidence, as to the occurrence itself, shows substantially the following:- Z. V. Kane and Johanna Kane, husband and wife, were the owners of a two-story and attic frame residence at 4037 Montgomery avenue. They lived in a building about ten feet away from the one in question. At the rear of number 4037, which was a three flat building, leading up from the back yard to the second story and then to the attic story, there was a stairway. There was no basement to the building. The building, which was about 18 years old, faced west and the porches, each at the rear, The porch of the second floor was about eleven feet from the ground. Around it on the south and east sides

there was a wooden picket railing, having a wooden rail on top, which was fastened to the upright at the corner of the porch with nails. The pickets were not fastened to, and did not reach the floor. The area of the porch was eight or ten by fifteen or twenty feet. The stairway was on the north side of the porch. Anyone going up or down the rear stairway to or from the third floor would necessarily pass within six feet of the south railing. Between the stairway and the railing on the south, was the back door of each flat.

The tenant of the third floor or attic was a Mrs. Klinger (sometimes spoken of as Mrs. Denk); the plaintiff and her husband and children were tenants of the second floor, and had lived in the building about six years. A Mrs. Arnett occupied the first floor. They were all tenants of the defendants who lived next door in the building ten feet to the south.

About eight o'clock, Sunday evening, June 13 1930, Mrs. Klinger, who was the tenant of the attic floor, standing on the second floor porch, near the railing in question, had a conversation with Mrs. Rahn, one of the defendants, talking across the area way between the two buildings. The defendant, Mrs. Rahn testified that as Mrs. Klinger got close to the railing she, Mrs. Klinger, said, "Do you know the railing is loose?" that she, Mrs. Rahn, said "No;" that Mrs. Klinger then said, "Look here," and showed that it was "shaky"; that she, Mrs. Rahn, then said, "I will tell Mr. Rahn about it."

On the following day, early in the morning of June 14, 1930, the plaintiff walked out of her second story flat on to the

early in the morning of

porch and undertook to shake a feather pillow over the south railing near the southeast corner. She had the pillow in her right hand and as she shook it, she leaned slightly, with very little force, against the railing with the right side of her body against it, and the whole railing gave way, and she fell, the rail going with her, to the ground, eleven feet below, and was injured.

The defendant has filed no brief in this court and the brief for the defendants contains a statement of the case, followed by one printed page, entitled, "Brief", setting forth three prints. Thebrief contains no argument. The points made are (1) that in the absence of an express contract there was no duty on the landlord to keep the premises repaired; (2) that where a porch appurtenant to an apartment is used by the tenant and is not necessary to the enjoyment of other tenants in the same building, the landlord owes no obligation to keep it in repair; and (3) that where there is a general duty to repair, the landlord in the absence of notice and reasonable opportunity to repair, is not liable. Two cases are cited for the defendant, Henry v. Breyer, 151 Ill. App. 566, and Burke v. Hulett, 216 Ill. 545. In the Henry case the tenant of a second floor was going up stairs to the third floor and was injured on a landing half way up, and it was held that the stairway and platform were not appurtenant to the second floor. The court said, "the portion of the stairs and the platform leading up fwom the second story platform to the third ptory platform were an appurtenance to the third story flat, and not a common appurtenance to both tenements." It will be seen that the facts in that case are not like those to be considered

here. The Burke case was one where the evidence failed even to show "when, how and in what manner" the death of the injured person was caused.

In Patterson v. Gnatek, 205 Ill. App. 309, where the plaintiff was a tenant on the third floor of a building with rear porches, it was held that where a three-story tenement building was provided with rear porches on each story communicating with each other by stairways, which were the only means of ingress and egress from the rear for the second and third stories, the first and second porches should be regarded as a common way which it was the duty of the owner of the building to keep in a reasonably safe condition for such persons as might have a legal right to use them.

In Smith v. Morrow, 230 Ill. App. 382, the court said, "Approaches for the common use of the tenants include the landings, stairways, porches, hallways and other means of approach to the several parts of the building when used by the tenant for the purpose of ingress and egress to and from the building to the yard and streets"

In view of what the law is, we feel that the evidence sufficiently justifies the verdict as to liability. The evidence showed that the railing was defective and out of repair; that one of the owners was directly informed of that fact the day before the accident; that the railing of the porch was only a few feet from the common stairway which was used not only for the second flat, but the third, all of which we think fully justified the verdict.

There is another reason why the judgment must stand. The brief for defendants contains no argument. A number of points are made, but none is argued.

Considerable evidence was introduced on the subject of damages. However, as there was evidence tending quite strongly to show that the plaintiff was seriously injured, her family physician testifying that there was a fracture of the sacrum on the left side, and as the subject is not discussed in the brief for the defendants, we feel that it is our duty not to go into the matter, and that we must consider any criticism of the amount of the verdict as waived. Edwardsville Coal Co. v. City Coal Co., 226 Ill. App. 150. The International Harvester Company, v. The Industrial Board of Illinois, 282 Ill. 489; American Cigar Co. v. Berger, 221 Ill. App. 285; Bissel v. Eastern Illinois Utility Co., 222 Ill. App.408.

The judgment will be affirmed.

AFFIRMED.

THOMSON , P.J. AND O'CONNOR, J. CONCUR.

421 - 39838

LOTTIE NATH, ET AL,

Appellees,

v.

BERNSTEIN FURNITURE COMPANY, a corp.,

Appellant.

239 I.A. 655

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 18, 1922, Foreman Bros., as trustee under the last will and testament of Louis Nath, filed a complaint in the Municipal Court, claiming possession of certain real estate known as street numbers 1648-1650 West Chicago avenue; and claiming that the defendants, the Bernstein Furniture Company and Abraham Bernstein, unlawfully withheld possession. There was a trial before the court, with a jury, and a verdict and judgment for the defendant, Bernstein Furniture Company, the other defendant being dismissed out of the case. An appeal from that judgment was taken to this court, and that judgment reversed, and the cause remanded. Foreman Bros. Banking Co., etc. v. Bernstein Furniture Co., 232 Ill. App. 617. There was a new trial, and an instructed verdict for the plaintiff. Judgment was entered upon that verdict, and this appeal taken.

Owing to the former opinion, it is unnecessary here to state in detail the history of the case.

The only question of importance now is whether the trial judge erred in directing the jury, at the close of all

Opinion filed Oct. 28, 1925.

the evidence, to find the defendant guilty of a forcible detainer. The crux of the case, as a matter of proof, was whether the defendant had given a written notice for the extension of a lease.

On that subject, Wade, an employee of the defendant, testified. We need not set forth his testimony. Suffice it to say, as this court has already said in its former opinion, "The determining fact was whether a written notice of the tenant's election to extend the lease was served upon the landlord and Wade's testimony tended to prove this." That being the situation, the duty of the trial judge was to submit the evidence to the jury. Libby, McNeill & Libby v. Cook, 222 Ill.306. Mirich v. Forschner Contracting Co., 312 Ill. 343, Devine v. Delavan, 272 Ill. 166; Kelly v. Chicago City Ry. Co., 283 Ill. 640; Chicago & Alton Ry. Co. v. Bates, 223 Ill. App. 325; McFarland v. Chicago City Ry. Co., 288 Ill. 476. It is urged that the evidence offered at the second trial was not entirely the same as that at the first trial. That is true; but the evidence of Wade at the second trial whether substantially the same or not, did in and of itself sufficiently tend to prove the defense set up, in our judgment, to justify the submission of all the evidence to the jury.

If the testimony of Wade is to be believed in full - and credibility in such a case is for the jury and not the trial judge to determine - then there was a series of facts established which tended directly to prove notice. Under the law, therefore, the evidence should have been submitted to the jury.

As this case is to go back for a new trial, it is apt to say that in our judgment Abraham and Charles Bernstein are still both incompetent witnesses. Even though the trusts under the will have become executed, as far as the Evidence Act is concerned, the former beneficiaries are still legatees or devisees, and, so, incompetent to testify as to matters occurring prior to the death of the deceased. Chapter 51, sec. 2, Cahill's Rev. Stat. (1933).

It is to be regretted that there must be another trial of this case, but, we are bound by the law. The judgment, therefore, will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON , P.J. AND O'CONNOR, J. CONCUR.

430 - 39847

ROSE STONE,
Appellee,

v.

MARY E. LAX,
Appellant.

239 I.A. 655

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 26, 1922, the plaintiff, Rose Stone, recovered a judgment before a Justice of the Peace, against the defendant, Mary E. Lax, in the sum of $300.00. That judgment was appealed to the Circuit Court, where there was a trial de novo before the court, with a jury, and a directed verdict for the plaintiff in the sum of $300. This appeal is therefrom.

At the trial, the defendant, called by the plaintiff as her witness, testified that she signed the note on which the suit was brought, and that nothing had been paid upon it since its execution and delivery. The note was introduced in evidence. It was dated September 2, 1921, for $300.00, and payable six months after date to the order of Mrs. Rose Stone. There was recited in it as part of the text of the note, the following: "For services from Jan. 17 to Aug. 1-1921, value received." The note was signed, Mary E. Lax, and it was admitted by her that it contained her signature.

Opinion filed Oct. 28, 1936.

The defendant testified, when called on her own behalf, that in 1931, the plaintiff, Mrs. Stone, was working for her, the defendant, in the latter's home; that she, the defendant, until May, 1931, was employed at the Federal Reserve Bank; that prior to May 1, she borrowed from the plaintiff $300; that on April 28 of that year, she made out a note for $300 to the plaintiff; that she had paid the plaintiff for her services up to January 14; that at the time she gave the first note, she borrowed $300 from the plaintiff. That note, being dated April 28, 1931, for $300, and payable ninety days after date, to the plaintiff, and signed by the defendant, was introduced in evidence.

The defendant further testified that the plaintiff worked for her for fifteen weeks from January 14 to April 28, at $10.00 a week, and that she owed her for those services $150.00. She further testified that she lost her position in the Reserve Bank about May 10, 1931, and that about that time she had a conversation with the plaintiff, in which she told plaintiff that she could stay until she got another position; that she mentioned it to the plaintiff again sometime in July; that the plaintiff at that time said, "I am not charging you anything for staying;" that "it was our agreement that she stay until I got another position."

The defendant further testified that the plaintiff, after May, rendered no services in the defendant's house; that prior to that time she had been the defendant's housekeeper; that in August, the plaintiff told her, the

defendant, that she was going to charge her for services; that the defendant said, "You haven't done anything, so I'm not going to pay you;" that the plaintiff answered, "Well, I want another note for my services until now;" that the defendant then said, "You won't get another note;" that the plaintiff said she was going to force her, the defendant, to make a new note; that the defendant said she would charge the plaintiff board if she did that; that the plaintiff said, "You owe me $300," and the defendant said, "I don't, I only owe for the note, from January 14 to the time I made the note out to you, April 28, which would be $150.00 and $10.00 for groceries;" that the plaintiff gave her an itemized account of what she owed her; that after the plaintiff had been away several weeks, she came back and said she would not leave the house until she got the notes; that she, the defendant, said, "I only owe you for one;" that the plaintiff said, "I will give you that back and you make me out two;" that "She refused to go until she got it, the only way I could get rid of her."

The record shows the following questions and answers:

"Q What did you do after she said she would not leave until she got her note?
A I gave her the note to get rid of her.
Q That other note was in place of this note?
A She gave me back that note then.
Q The other note for the one that is sued on here?
A $300 I borrowed."

The defendant further testified that the plaintiff stayed at her house until about September 7; that the plaintiff had a room in the house and was there most of the time; that a reasonable charge for her room and board would be $5.00 a week. On cross-examination, she testified that the

plaintiff worked for her father before she worked for her, the defendant; that she, the defendant, had paid the plaintiff up to January 17; that the plaintiff continued to do the same kind of work at $10.00 a week for her, the defendant, not only up to the 28th of April, but up to the 10th of May, when the defendant lost her position with the Federal Reserve Bank. She further testified, on cross-examination, that after she left the Federal Reserve Bank, she went into the real estate business, so was out of the house a great deal; that she had an automobile which she had bought before she lost her position, which she used in conducting her real estate business.

After testifying in regard to various conversations with the plaintiff, and about the plaintiff's services, the record shows the following:

"Q After all these arguments, you gave her this note for services?
A Not for services, I signed that.
Q What did you sign that note for?
A I don't know why; I did it.
Q After all these arguments and talks, you never had any arguments after that?
A Not that I know of."

There was introduced in evidence a letter dated January 3, 1922, signed by the defendant, to the plaintiff, in which she expressed with some extravagance, her affection for the plaintiff, and in which there occurs the following: "I am working now every day, and the boss told me today he was going to give me a nice big raise, so I will try and send you some, for I know you will need it." There was also offered in evidence a letter dated February 30, though the year is not given, from the plaintiff to the defendant, con-

taining the following: "I take this way of letting you know the notes come due the 2nd of March. I will send same to the Brookfield Bank for collection, if this is all right with you. They said they would take care of it for me."

The defendant further testified, on cross-examination, that after the plaintiff had left her and gone back to Indiana, and after she, the defendant, had gotten the letter just referred to, she never wrote to the plaintiff and made any complaint or objection.

At the close of all the evidence, counsel for the plaintiff asked for an instructed verdict in the plaintiff's favor. Counsel for the defendant suggested to the trial judge that the evidence showed a want of consideration, but the trial judge granted the motion on behalf of the plaintiff, and instructed the jury to bring in a verdict for the amount of the note for the plaintiff.

The evidence given by the defendant as a witness, is somewhat incoherent and confusing, but a close examination of it leads to the conclusion that the note in question was given for full consideration and was not given as the result of duress or coercion.

We think that the evidence of the defendant herself, demonstrates that she had no defense. The letter in February of the next year seems to be a complete refutation of her testimony as to what transpired in regard to their relations in 1921.

The plaintiff was in the employment of the defendant as her housekeeper or servant, and on April 28, 1921, apparently, the defendant borrowed from the plaintiff $300 for ninety days, at 7% interest, giving her note for that amount. On September 8, 1921, at the plaintiff's request, the defendant gave the plaintiff two notes, one for borrowed money of $300 (the plaintiff, apparently, returning to the defendant at that time the first note of April 28,1921, which was past due),and another note for $300 for services from January 17 to August 1, 1921. The latter note is the one in suit here.

Taking into consideration, therefore, all the record shows, and bearing in mind that the defendant admits the execution and delivery of the note, and when asked, why she signed it, answered, Idon't know, in our opinion, there was, in reality, no evidence tending to show either that the note was wholly or in part without consideration, or had been executed as the result of coercion, and, therefore, no evidence which justified submitting it to the jury.

In Mirich v. Forschner Contracting Co., 312 Ill. 343, the court said that it is the settled law in this state that a trial judge, when a jury is not waived, "has no power to determine the weight and preponderance of conflicting evidence introduced to establish or disprove the facts," and "that the trial judge is never authorized to take a case from the jury where there is legitimate evidence tending to prove the cause of action." Here we hold that there is no such evidence tending to prove a defense to the note.

The judgment, therefore, will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

442 - 39859

ANNA HOFMEISTER,

Appellee,

v.

M. A. SOPER, doing business as M. A. SOPER & CO.,

Appellant.

239 I.A. 656

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed October 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant, M. A. Soper, doing business as M. A. Soper & Co., from a judgment for the plaintiff for $1,750.00, for alleged personal injuries resulting from being run into and injured by a motor truck owned and operated by the defendant.

It is contended for the defendant (1) that the first count of the declaration - upon which alone the verdict may be predicated - is materially defective in that it does not allege that Robey and Fulton streets, at the intersection of which the collision took place, are public highways; and (2) that the evidence adduced on the trial shows that the plaintiff was guilty of contributory negligence.

(1) It is alleged in the first count of the declaration, that on January 14, 1922, in the City of Chicago, in Cook County, the plaintiff was walking with ordinary care upon and across Robey street in a southerly direction, and over and across Fulton street, and the defendant was then and there possessed of and driving a certain auto truck easterly

Opinion filed October 26, 1903.

upon and along Fulton street and near and toward the plaintiff, and so carelessly drove and controlled it that through the negligence of the defendant the plaintiff was struck and run down and injured. As the second count alleged wanton driving, and as it is not contended for the plaintiff that the evidence supported that charge, it is only necessary to consider the sufficiency of the first count.

To maintain the contention that the declaration is materially defective, it is argued that there is no allegation that Robey and Fulton streets are public highways; and without that, no duty is alleged, and, so, no duty being averred, no negligence is charged. As a matter of common sense, however, alleging as the declaration does that the locus in quo was "in the City of Chicago, in the County aforesaid," the County being named in the statement of the venue, it would be hypercritical to hold that the succeeding description using the words Robey street and Fulton street, did not designate two public streets or highways. The expression Robey street in the City of Chicago, County of Cook, we think connotes a public and not a private place. The word street, used without limitation, generally gives rise to the idea of a public way, a place maintained for all, and not one restricted to private use. "A street is a public road or way in a city, town or village." Elliott, Roads and Streets, p. 12.

In the City of Rhode Island v. Starkey, 191 Ill. 94, cited for the defendant, one of the actual defenses was that the place where the alleged accident occurred was not a public street as to which the City was charged with any duty or

responsibility. Here, no such issue was made, and the only question is whether the allegations of the declaration justifies the inference that the locus in quo was a public highway, and as a result, would support the verdict and the judgment.

In our judgment, a declaration in a personal injury case, which alleges the locus in quo as the intersection of two streets and the names of the streets and the city and county and state are set up, and the only issue by the pleadings is that precipitated by the plea of thegeneral issue, and no question is raised in the course of the trial that the streets were not shown to be public highways, is sufficient to support a verdict and judgment for the plaintiff. Further, it is our opinion that it is a fair and reasonable inference, from the allegations of such a declaration, that the streets as described are to be considered to be public highways and, as a consequence, such a declaration stated sufficiently facts from which the law implies a duty on the part of the driver to exercise such care as is required by law of a driver of a vehicle on a public highway.

(2) The plaintiff, a woman sixty-six years of age, testified that on January 14, 1933, in order to get to her home, she walked south on the east side of Robey street, a north and south street, to Fulton street, an east and west street, to take a northbound Robey street car at Fulton and Robey streets; that when she got to Fulton street she started to walk across that street, walking on the crosswalk, and was almost across when she saw a truck coming from the south on Robey street. Her exact testimony in the record is as follows:

"Well, I seen a truck come north from the south, you know, but I didn't know if the truck would go the other way, you know; going east, you know, so when I seen them come, it was too late for me to move, you know, and all at once I was thrown down on the street, you know, from the truck." She further testified that the truck, when it got to Fulton street, turned east and struck her before she could get away; that her left leg was injured; that she was picked up at once, and shortly afterwards taken to a hospital. She further testified that as the truck came around the corner, she did not hear any horn blown.

When asked where she was when she first noticed the truck turning the corner, she said she was ready to go over to Robey street and Fulton and take her car; that she was not in a hurry, as there was no car in sight; that at the time, she was not far, "not very much at all" from the Fulton street curb, not over 18 inches.

On cross-examination, she testified that the front part of the truck hit her on the left side of her body; that she was thrown down on her left side; that at the time she was hit she was walking south on Robey street, on the east side of the street; that when she got almost to the south side of Fulton street, the truck came along and knocked her down; that the front part of the truck struck her; that the truck struck her on her left side; that she was very much frightened when the truck hit her; that when she first saw the truck it was going, though not very fast, north on Robey street; that she had started across before she saw the truck, and when she saw the truck, she was not quite in the

middle of the crossing; that the truck, when she first saw it, was not quite in the middle of the block to the south; that she did not stop while she was walking across the street; that when the truck turned east, it was too late for her to start back; and then she was struck; that the truck stopped about the time it hit her; that when it stopped she was in front of it, lying down on her side.

One Frank Zick, who was on the northwest corner of Fulton and Hobey streets at the time, going north, testified that his attention was attracted to something unusual by a woman's scream, and that he turned around and saw a truck coming around the corner and knock a woman down; that the truck was just turning around the corner when he first saw it; that at the time when he first saw the woman, she was between the curb and the east bound track, on the south side of the street; that the front wheels of the truck knocked her down; that no horn was blown; that the truck was coasting around the corner; that it was going slowly; that it went three or four feet after it struck her; that it occurred about noontime; that the woman's face was bruised and she complained about herleg; that there was only one man on the truck.

On cross-examination he testified that he and the driver picked the plaintiff up; that he did not see anything until he heard the scream; that when he turned around and saw that one of the front wheels just about pinched one of her legs; that she was on the ground when he first turned around; that the truck was coasting at the time it hit the woman, that the driver said so himself; that when the truck

hit the plaintiff she was directly in front of it; that then it ran three or four feet; that her feet were pointing crosswise, and one of her legs was pinched by the front wheel, and the rest of her body was in front of the truck.

On re-direct examination, he testified that when he first saw the plaintiff she was already under the car; that when he first saw the truck it was going around, about 9 or 10 feet from the corner, going north, about 2 or 3 feet from the woman.

The witness Robert Jacobs, a chauffeur of nine years' experience and who was the driver of the truck for the defendant at the time in question, testified that the truck had a wooden bumper about two and a half feet above the ground, and a high square radiator; that the bumper extended about six inches over the front wheel; that on the day in question he was driving north on Robey street, and had a load composed of three tons of pipe on the truck; that he drove north on Robey street, and as he came to Fulton street slowed down to about five miles an hour; that there were three or four people crossing the street, going south on Robey street, and he slowed down to give them a chance to get across on the south side; that when it was all clear, he started up to go ahead, when the plaintiff - she had started to go south - turned around and went north, and then turned around and tried to go south again; that he was then too close to her, and as she swung around in front of the truck she put her hands up on the radiator to protect her head; that the radiator was hot; that then she fell, and he backed right away from her and stopped and got down and

nearly flush with the sidewalk; that when the plaintiff put up her hands, she was practically on the crosswalk; that he did not hear any scream or noise of any kind; that no one came to help him after the accident, save a man who came out of his saloon across the street; that his truck weighed 7,050 pounds when he had a full load on; that the plaintiff put her hands on the radiator, "bowed her head just when she stepped up there and hit her head. Then she put her hands on the radiator - it was hot, and she fell right back, she fell to the sidewalk;" that she was lying on her back when he picked her up.

The witness Dorothy Salzman, testified that at noon on Saturday, January 22, 1922, as she was going home from work and was walking south on Robey street, she saw the truck coming from the south and turning east on Fulton street; that at the same time, the plaintiff was going south on Robey street; "As I walked south on Robey street, there was a lady coming south on Robey street, and a truck was coming from the south and running east on Fulton street, and as the truck was going east, this lady came by; she walked by the curb, near the curbstone, then she walked back and got hit." She further testified, that when she first saw the truck it was just turning east on Fulton street; that the plaintiff passed the truck and "she came by it again, and she goes, laid on the fender with her hands up; she hit her head;" that she went south and then came back just a few feet; that the truck stopped; that she did not think the truck hit the plaintiff, but that the plaintiff must have got excited; that she laid right on the truck.

On cross-examination she testified that when she first saw the plaintiff, the latter was almost up to the curb; that the truck was just going east; that she, the witness, was at that time on the northeast corner of Robey street and was facing south; that the plaintiff was walking fast; that the plaintiff walked up and back, and the truck stopped and the plaintiff fell right on the truck; that after the plaintiff fell, she, the witness, did not do anything, but got on a street car and went home; that about four or five persons who were in the neighborhood, helped to take her, the plaintiff, into the corner saloon; that when the plaintiff fell on the truck, she screamed; that it was a pleasant day, and the condition of the street was pretty dry; that she knew the defendant Soper before the accident, and had worked for him; that at the time of the accident, she was about twenty feet from the northeast corner of the intersection; that when the plaintiff passed the truck the first time, it was about three or four feet away from her, going south; that then she turned east and went north again.

It will be seen from the foregoing that the testimony of the witnesses for the plaintiff, and that of those for the defendant, is in conflict; and the question arises whether such discrepancies are shown as would justify this Court in overriding the determination of the jury. The evidence for the plaintiff makes out a prima facie case. According to her testimony, she was walking south on Robey street and was on the crosswalk, as she had a right to be, and had almost reached the sidewalk on the south side of Fulton street, when she was suddenly struck by the truck. She says

that she saw the truck turn east, but that it was then too late for her to go back, and that she was then struck. The driver of such a heavily laden struck, when suddenly changing his direction, turning from going north to going east, is bound, in the exercise of ordinary care, to be watchful and to consider the danger that may arise as the result of a foot passenger crossing the street which he is about to enter. It is true that the testimony of Zick, who was at the northwest corner of the intersection, at the time, does not help in regard to what transpired before he heard the plaintiff scream. He does state, however, that at the time he first saw her, she was between the curb, and the east bound track, on the south side of the street, and, also, that no horn was blown. On the other hand, the testimony of the driver, corroborated, in part, at least, by the witness Salzman, puts the blame upon the plaintiff, and charges her with contributory negligence. Where the evidence is conflicting, as it is here, and two practically different states of fact are testified to, one on behalf of the plaintiff, and one for the defendant, obviously the question to be answered, in endeavoring to do justice in the matter, is clearly one of credibility. And as to that, the jury were in a much more advantageous position than we are. Considering, therefore, what the record shows, and bearing in mind the superior situation of the jury in passing upon the trustworthiness of the witnesses, we do not feel justified in reversing the judgment.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, J. CONCURS;
THOMSON, P.J. DISSENTING:

I am unable to concur in the decision

of this case, as announced in the foregoing opinion. I believe the judgment appealed from is against the manifest weight of the evidence, on the issue of the plaintiff's contributory negligence. That she was guilty of such negligence is shown by the testimony of the defendant's chauffeur, Jacobs, and the witness, Dorothy Salzman. If the plaintiff's testimony gave a clear and distinct account of the occurrence, and if it appeared clearly, from her testimony, that she, herself, was not negligent, I would concur in the decision of this case, even though the plaintiff was not corroborated by other testimony. But, I am unable to consider that the plaintiff's testimony does give a clear account of what happened, nor is it at all certain, from her testimony, that she was in the exercise of due care. She, herself, insists that the defendant's truck hit her on her left side. Thus she shows, by her own testimony, that at the time she was hit she had turned around and was going north, although, according to all the testimony, including her own, she had been nearly across the street, and, therefore, would have been well out of the path of the truck if she had not become confused and turnedback. I cannot see that her confusion was caused by any negligence on the part of the chauffeur. His truck was in full view of the plaintiff at all times while she was passing over this crosswalk and, according to all the testimony, it was going very slowly.

455 - 23672

JAMES R. WOOLRIDGE, et al,
Appellees,

v.

RUBY KRAUSE LEVY,
Appellant.

239 I.A. 656

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit by the plaintiff, James R. Woolridge, and A. C. Baker, co-partners doing business as James R. Woolridge, Sales Agent, against Ruby Krause Levy and Simon Levy, doing business as the Bernice Coal Company, for $1,157.32, damages for breach of a written contract for the sale of thirty-five cars of coal by the plaintiff to the defendant. There was a trial before the court, with a jury, and a verdict and judgment in favor of the plaintiff for that sum. This appeal is therefrom.

The plaintiff was a distributor and wholesale dealer in coal, engaged in business at Woolridge, Tennessee; buying in carload lots at the mines and then selling dealers, brokers and consumers. The defendant was a coal dealer, engaged in business in Chicago and at other places, under the name of the Bernice Coal Company. At the close of the evidence, the summons, praecipe and pleadings were amended by striking out and dismissing as to one of the defendants, Simon Levy, leaving Ruby Krause Levy as the sole defendant.

Opinion filed Oct. 29, 1956.

The coal in question was not bought for consumption by the defendant, but to be shipped to her customers according to orders and instructions from her. The defendant had bought coal from the plaintiff prior to the time the contract in question was made.

The defendant wrote to the plaintiff at Chicago, on April 6, 1921, stating that she was in the market for 25 cars of coal for shipment in June, and 25 cars for each month after that up to April, 1922, and in that letter said, "We will be glad to have your price on this contract." The plaintiff, on April 8, 1921, answered that letter, and stated that it was likely he would be in a position to furnish the coal for shipment to points on the Southern Railway, and that "any orders would be booked subject to the usual contingencies." Also, in that letter, the plaintiff said, "All quotations are necessarily for immediate acceptance."

On April 27, 1921, the defendant wrote to the plaintiff, "We enclose you our first order * * *. We expect to send you orders for twenty-five cars a month beginning with next month conforming to your letter of April 8th, and hope you will be able to take care of us right along." The order in that letter was for one car of Jellico Lump, at $4.40 a ton. That order was filled by the plaintiff, and the defendant paid for it by check.

On May 13, the plaintiff wrote to the defendant - and enclosed the contract, theone here in question - as follows: "In line with your suggestion, hand you herewith

for your signature a contract covering ten cars per month of Jellico Lump Coal, up to September 1st, on the basis of prices quoted you in my letter of May 2nd. If entirely satisfactory, kindly sign this contract and return to me, and I will forward you counter-part with my signature to close the contract."

On May 21, the defendant wrote to the plaintiff and enclosed the written contract signed, "Bernice Coal Company, Simon Levy, General Manager," and on May 24, the plaintiff signed a duplicate of the contract, and sent it to the defendant. In a letter which accompanied the contract, the plaintiff wrote, "I need your shipping instructions on this coal in order to complete the shipment within the time designated." The contract in question was for thirty-five cars of Jellico Lump Coal, to be shipped as follows: "Shipping Instructions, Five cars in May, ten cars in June, ten in July and five in August." The contract contained the following, "Provided, however, that this sale and purchase contract in its entirety is made subject to the conditions, terms and stipulations herein set forth:

> (a) After the exercise of due diligence on the part of the Seller, no liability shall rest with him for failure to make shipments of coal under this contract, as ordered, stipulated or required by the Purchaser, if prevented by mining or labor troubles, shortage of railway equipment, accidents or any other unavoidable causes, and such deficit of the purchaser's requirements as may result therefrom will be considered as eliminated from this contract.
>
> (b) This contract, with all other existing contracts and orders accepted by the Seller for like kind, grade or size of coal, to be shipped to other persons, firms or corporations, shall have concurrent rights as to shipments; and likewise any subsequent sales of coal to others shall have concurrent rights with this contract, provided that existing contracts and orders

as of this date, do not exceed normal output of supply of the seller.

(c) In the event of a reduced or restricted output of mine or mines producing the coal designated herein which may prevent the Seller from furnishing the full requirements of the Purchaser under this contract, the Seller shall ship the Purchaser while such condition prevails, such percentage of the available output of the mine or mines producing the coal designated herein, as will be proportionate to the relation that the Purchaser's requirements as stated herein bears to all of the Seller's obligations."

On May 28, 1921, the defendant wrote the plaintiff, "We have your order of the 24, and we are doing our very best to get our customers to begin giving us shipping instructions on these orders just as quickly as possible, and will forward them on to you just as soon as we can get them from our customers."

On May 30, the plaintiff wrote to the defendant stating that he would be glad to have her shipping instructions as quickly as possible, "as my sales of any surplus tonnage are governed by existing contracts."

The plaintiff, James R. Woolridge, testified (by deposition) that while negotiating the contract in question with the defendant, he was arranging with the Falls Branch Coal Company to furnish him the necessary coal provided for by the terms of the contract with the defendant, and that he obtained an option from the Falls Branch Coal Company for that amount of coal at fixed prices subject to confirmation if his trade with the defendant was consummated; that on May 24, when the trade was consummated, he closed the deal with the Falls Branch Coal Company for thirty-five cars, the quantity of coal called for in the contract made with

the defendant. He further testified that his contract with the Falls Branch Coal Company was made on such terms and conditions that it called for delivery by that Company to the plaintiff in the amounts and during the time stipulated in his contract with the defendant. He further testified that the defendant never at any time furnished him with shipping instructions for the coal called for in the contract; that he wrote to the defendant on June 11, stating that he was "yet without shipping instructions on the tonnage covered by your contract with me for June delivery, and as nearly one-half the month is gone I write to bring the matter to your attention;" On June 16, the defendant answered the plaintiff's letter of the 11th as follows: "We appreciate your letter of the 11th inst., and are indeed sorry to advise that so far as we have been unable to secure orders in the territory your coal can go. However, we hope to land some for you in the next week or so."

On June 29, the plaintiff wrote to the defendant as follows: "Referring to your contract with me, would state that I assume you will be in position to take during July the fuel tonnage called for by contract, and that you will likely be in position to handle some of the tonnage that should havegone to you in June. Kindly advise by return mail with definite shipping instructions."

On July 5, the defendant replied to the plaintiff's letter of the 29th, stating: "our customers whom we expected to take your coal won't pay us your price for it, and although we have been working very hard on the proposition trying to get them to give us their orders, we have not

been successful."

The plaintiff testified that during all that time he was able, ready and willing to comply with the contract on his part and ship the coal.

On July 9, the plaintiff wrote to the defendant as follows:

> "I have your favor of the 5th inst. and understand from same that you have been unable to furnish me shipping instructions on my contract with you because of the fact that the current market on Lump coal has not kept pace with the schedule of prices on contracts made earlier in the season. It was natural to assume that when you made this contract you had disposition or knew that you could get disposition for the tonnage contracted for, and as matters stand I will have to take the coal from the mines, and dispose of it at the market, and the difference between my selling price and my contract price with you, is properly chargeable to you on this tonnage. I made a contract with the mines to furnish the coal covered by my contract with you, and I am compelled to take the coal.
> "I want to be reasonable in the handling of the contract, and in order to make it possible for you to furnish me disposition I will make the price to you $4.50 per ton f.o.b. mines on the coal for which you furnish me shipping instructions, that will enable me to ship during the month of July, and you can make up your June quota on this basis as well as the tonnage called for to be delivered in July."

On August 4, 1921, the plaintiff not receiving any answer to his letter of July 9, wrote to the defendant as follows:

"Due to the fact that you failed to furnish me shipping instructions for the coal you purchased from me, covered by contract of May 13, 1921, I was forced to sell this coal on the open market, at prices lower than the contract prices.

> I sold for your account in May five cars, 229 tons, at a loss of.....$80.15

I sold for your account in June ten cars, 463½ tons, at a loss of $308.40

I sold for your account in July ten cars, 441½ tons, at a loss of..... 375.07

$664.63

I have charged to your account the $664.63 which I have lost through your failure to take the coal you contracted with me to furnish, and I will appreciate your check by return mail to cover."

On August 5, the plaintiff wrote to the defendant;

"On my contract with you of May 13, 1921, there are due you for August shipment ten cars of Jellico Lump Coal at $5.20 per ton f.o.b. mines. I am in need of disposition for this coal, and will ask that you furnish me shipping instructions promptly on same, as otherwise I will be forced to sell for your account, as I have contract with the mines for this tonnage and the mines expect me to take it."

On August 12, the defendant wrote to the plaintiff:

"Your letter of August 5th has been received, and you have no right to sell coal for our account, as we have not authorized it, nor will we authorize it under any circumstances. Your contract provides- if you cannot make shipments for reasons beyond your control, or through conditions beyond your control, that you are not to be held responsible for it."

In that letter the defendant further writes that she had made every effort to get the customers to take the coal, but they would not do so; that the failure was not the defendant's and that, therefore, she was not responsible. The last paragraph of that letter is as follows:

—

> "You knew when you sold the coal to us that we were buying it for our customers - that we could not use it for ourselves, and if our customers refuse to take it in, this is a feature which we cannot control."

On August 18, the plaintiff wrote to the defendant stating that the contract in question was not subject to the interpretation made by the defendant, and that the coal called for by the contract had been sold for the defendant's account, and that he was selling for the defendant's account the coal called for and to be shipped during the month of August. In that letter the plaintiff requested a remittance for $664.82, to cover the amount due the plaintiff on August 1st.

The plaintiff wrote two more letters to the defendant, one on September 6, and on on September 23. In the letter of September 6, the plaintiff wrote to the defendant:

> "Due to the fact that you refused to furnish me shipping instructions on the coal you purchased from me for August shipment, covered by contract of May 13, 1921, I was forced to sell this tonnage, 452 tons, on the open market at an average price of $4.11 per ton, thereby losing $1.09 per ton, a total of $492.68, which amount I have charged to your account. This with previous charges to your account makes $1157.30 dueme from you, and for which amount I will ask that you send me check by return mail."

In the letter of September 23, the plaintiff wrote to the defendant that he had conferred with his attorneys, and was advised that the defendant's position was untenable, and informed the defendant that if he did not hear from the defendant by October 15, he would take such action as he deemed necessary to protect his interests.

The plaintiff testified that he sold the thirty-five cars of coal at the market price on the dates that the Coal Company notified him the coal was loaded and awaiting his order; that the Falls Branch Coal Company made him take the coal; that it delivered the entire thirty-five cars to him at the mines.

There was put in evidence for the plaintiff the dates on which the various tonnage was sold, and the prices per ton, and the names of the purchasers. He further testified that the prices were the best obtainable at the time the coal was sold and delivered. He also testified that it was the custom and usage prevailing in that district to give shipping instructions at the time the contract was made, or to give instructions prior to the time the date shipments are scheduled to go forward. He further testified that he understood that the defendant was not going to use the coal herself, but that she proposed to sell it and would, before the time fixed in the contract, furnish him, the plaintiff, with shipping instructions as to when and to whom to consign the coal. He further testified that there were no mining or labor troubles, shortage of railway equipment, accidents, or any other unavoidable causes, such as were mentioned in the provisions of the contract, and that none of the causes mentioned in Clause 8 of the contract in regard to preventing the purchaser from receiving or using the coal, occurred or interfered with the defendant accepting the coal, or furnishing instructions for its delivery; that the defendant never made

any claim based on Clause G.

It is claimed that the contract in question was void for want of mutuality. Counsel for the defendant cite two Illinois cases; Higbie v. Rust, 211 Ill. 333, and Joliet Bottling Co. v. Brewing Co., 354 Ill. 219, as supporting that claim. In the Higbie case the contract involved the promise, "I will send you what five pound jelly pails you may want at forty cents dozen, f.o.b. Keene and will allow five per cent for cash in ten days." Of course, as the court in that case said, "He (the purchaser) might elect to sell no five pound pails whatever, or to purchase all he should sell from some person other than Rust. There was no agreement on Higbie's part to take or want any pails whatever." In the instant case Woolridge promised to sell and the defendant promised to buy 35 cars of coal at a specified price, within a definite, fixed time. There was not,as in the Higbie case, any uncertainty as to the amount. In the Joliet Bottling Co. case, neither the duration of thecontract, nor the quantity to be delivered was fixed. Such is not the case here; where both the time and amount were mutually agreed upon. The amount was 35 cars, the time was five cars in May and ten in each of the months June, July and August, and the quality was "Jellico Lump Coal." Where the amount of merchandise, or the time of delivery, is left by the contract entirely to the caprice or judgment of one of the parties, it may be said to be without mutuality. Such is the Higbie case. In Crane v. Crane & Co., 105 Fed. 869, cited for the defendant, the contract was that the vendor "was to furnish to the former

(the vendee) all the dock oak that the former would require for their trade in Chicago market during the year 1897." There the quantity was not ascertainable, and so the contract, as held, was void for lack of mutuality. Where, however, the minds of the contracting parties have met on quantity, quality, price and time, there is mutuality; and the mutual promises become each a consideration for the other, and mutual, binding obligations arise. Bearing those principles in mind, was the contract here in question mutually binding?

It is urged that Clauses (a)and (b) are so devised that the seller might accept from third parties as many orders as he wished, and as a result, the buyer would have to be satisfied, not with the 35 cars specified in the contract, but such a proportion of 35 cars as the total amount of coal the seller had for sale, bore to the total amount of his orders; and that, as a result, if the price declined, the seller could hold the purchaser to the full 35 cars, but if it rose, he could sell to others at higher prices, and then only be bound to deliver to the buyer of the 35 cars, that part of the 35 cars which the total amount of coal for delivery bore to the total orders.

Interpreted reasonably, however, clause (a) merely provides protection for the seller in case he is "prevented by mining or labor troubles, shortage of railway equipment, accidents, or any other unavoidable causes," from making shipments. Of course, if the seller set up in a suit any one of those provisions as a defense, he would

have to prove it as a matter of fact. Obviously, he could not of his own volition bring into being any of those exceptional conditions. Further, clause (b) limits the seller's rights even under the exceptional conditions, and provides that he is bound to give the purchaser "concurrent rights with all other purchasers." The two clauses, (a) and (b), taken together are complementary and reasonable. They in no way give the seller an option merely to be determined by his own caprice or will. The contract is a form used by coal operators and wholesale dealers of coal in Southern Appalachian Field, which covers Southern Kentucky and East Tennessee; and is used by an association of over 150 operators and wholesalers in that field.

It is contended (1) that no injury or damage to plaintiff was shown; (2) that all of the coal was resold by the plaintiff prior to the time of performance; (3) and that by such resales the plaintiff rendered himself incapable of fulfilling his promise, and, so, was guilty of the first breach of the contract. In our judgment, those contentions are untenable.

By the contract of May 12, 1931, the plaintiff sold to the defendant 35 cars of coal "to be shipped during the next four months * * * which the purchaser buys and will pay the price per ton * * * stipulated." The contract provided for the price, f.o.b. the mines. The place to which it was to be shipped was not set forth; that remained for the purchaser to determine, and so put upon the purchaser an obligation, in the nature of a condition precedent, to inform the seller in apt time as to the places to which the

cars should be sent. The seller asked for shipping instructions on May 24 and 30, June 11 and 29, July 9, and August 4, 15 and 18, and got none. On May 28, the purchaser wrote that instructions would be forwarded "just as soon as we can get them from our customers"; on June 16, "Sorry to advise you we have been unable to secure orders in the territory your coal can go. Hope to land some for you in the next week or so;" on July 5, "Although we have been working very hard on the proposition trying to get them to give us their orders we have not been successful;" on August 12, "You knew when you sold the coal to us that we were buying it for our customers - that we could not use it ourselves, and if our customers refuse to take it in, this is a feature we cannot control."

As the court said in Walker v. Tucker, 70 Ill. 527, "It is no defense for a breach of a contract that to perform it would be unprofitable." The claim of the purchaser, from time to time, that she did not get orders from her customers, and so could not give shipping directions, merely meant, practically, that if she got orders so that she would be able to give the seller shipping directions, she would lose money. As the court said in Hartje v. Keeler, 133 Ill. App. 461, "It is, when analyzed, simply a statement that he could not profitably sell it."

It is urged that the plaintiff should have held each month's quantum of coal until the end of the month, but as the defendant was bound to give shipping directions each month, as the evidence shows, and she never at any time within that whole period gave any instructions whatever,

and, obviously, was not able to do so, because she, herself, had no orders for the coal, and meanwhile the plaintiff was urgently requesting shipping directions, having bought the 35 cars outright to fill the defendant's order, it would not be reasonable to hold that the plaintiff forfeited his rights because he did not do an admittedly useless thing. Especially is this true when there is no evidence whatever that the plaintiff would have gotten a higher price for the benefit of the defendant if the coal had been sold later and after some formal notice to the defendant. Why give notice when the defendant throughout the whole period insisted that he was not able to give shipping directions? Never once was she in a position to accept a single car, and, in substance, so informed the plaintiff. It would have been entirely supererogatory for the plaintiff to notify the defendant. Each knowing the facts, the plaintiff had the right to dispose of the coal without giving - what would have been - a needless formal notice. The defendant cannot complain, knowing as she did, that such notice would have been superfluous, and would have made no difference to her rights or obligations. The law does not generally require done that which is obviously without value. It is a fair inference that the defendant failed to get orders, and was, therefore, unable herself to give shipping directions to the plaintiff because she was unwilling to sell the 35 cars of coal which she had bound herself to buy, at a lower price than she had contracted to pay for them. There is no evidence that the defendant was hurt because the coal due to be shipped each month was sold by the plaintiff before the termination of each month, respectively.

If the defendant had shown that the market price had been more favorable if each month's quantity had been held and sold at or after the expiration of the month, the argument that was made might be plausible; but from aught the record shows, the alleged premature sales may even have been to the advantage of the defendant. Nor is there any evidence that the defendant sent directions for any shipment after the plaintiff had sold any of the 35 cars. If in apt time, the defendant had sent such directions, the plaintiff might have been held to have sold the coal prematurely and, therefore, at his peril, and would have been obliged to fill the defendant's orders, or suffer the consequences. Selling from time to time before the end of each month, did not necessarily put it out of the power of the plaintiff to fulfill his contract. There is no evidence to that effect. And this is not a contract for specific goods. Considering the history of the defendant's conduct, she was practically in default from the beginning, and all, it is fair to assume, because the price to be paid the plaintiff was higher than she could sell the coal for to her own customers.

There was here no sale of any specific coal. No title to any car of coal passed to the defendant. Although the plaintiff ordered from the Falls Branch Coal Company coal so as to prepare himself to carry out his contract with the defendant, it was not necessary for him to use that coal to fulfill his contract with the defendant. When the plaintiff sold coal of the kind the defendant contracted for, that fact merely showed the market price, and also that he was ready and able to carry out his contract. As no title has passed to the defend-

ant, no question of a resale arises.

The plaintiff proved the difference between the market and the contract price. That was proper and justified both by the pleadings and the evidence.

The judgment, therefore, will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

29890

473 - 29890

ANTON KOSMOWSKI,

Appellee,

v.

KARL PUSWASKIS and PAULINA PUSWASKIS,

Appellants.

239 I.A. 656

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Antone Kosmowski, obtained in the Municipal Court a judgment by confession in the sum of $691.25 against the defendants. On motion of the defendants, supported by an affidavit it was opened up and the defendants given leave to defend; the judgment meanwhile, to stand as security. There was a trial by the court, with a jury, and a verdict and judgment for $691.25 for the plaintiff. This is an appeal therefrom.

At the trial, the plaintiff introduced in evidence a promissory note dated July 18, 1916, for $500.00, payable on demand to the order of the plaintiff and signed by the defendants; and the plaintiff himself testified that the note was made out in Paul Irose's office, and that it was given for full consideration. Having made out a prima facie case, the defendants put in evidence tending to show that they never signed the particular note in question. In rebuttal the plaintiff put in evidence to show the circumstances surrounding the giving and signing of the note.

Opinion filed Oct. 28, 1858.

That evidence tends to show that in 1912, the plaintiff loaned the defendants certain sums of money, giving them two checks aggregating $517.00, therefor, and that on July 18, 1913, there was a settlement of pending money matters between them; that on that date an assignment of a judgment for $641.67 against a Brewing Company in favor of one of the defendants, which had been assigned on March 24, 1913, to the plaintiff, was merged in a settlement of certain matters pending between the defendant Karl Puswaskis and the Brewing Company, and as a result the note for $500.00 here sued upon was given by the defendants to the plaintiff.

It is contended for the defendants that the trial judge erred in admitting in evidence on rebuttal two checks, one of $100.00, dated March 6, and one for $417.00, dated June 27, 1913, which it was claimed were the original consideration moving from the plaintiffs. That is untenable. Having made out a prima facie case by the note and testimony of the plaintiff, he was then entitled after the defendants had closed their case to rebut it, by endeavoring to show just what the consideration of the note was. Such evidence was unnecessary until the defense was made. Quality Car Co. v. Corkhill, 183 Ill. App. 175.

Complaint is made that the defendant Karl Puswaskis was referred to as the plaintiff's brother-in-law, and that the jury may have been improperly influenced by the statement. That seems to be an unsubstantial objection, especially as at the time of the trial, the relationship did actually exist. It is contended that it was error not to permit Hillis, an

attorney to testify. His testimony, however, the record shows would have been concerning the assignment of the judgment in March, 1913, and the docket evidence in the case of Puswasky v. Kersten and the Conrad Seip Brewing clearly shows that the assignment was made on March 24, 1913. It is, also, contended that it was error to permit Irose, an attorney to testify for the plaintiff. That is untenable. Irose's testimony shows that both the plaintiff and the defendant, Karl Puswaskis were present when the events occurred concerning which he testified.

The evidence overwhelmingly shows that the verdict of the jury was justified.

We feel bound to criticise the brief filed for the defendants. It does not contain a sufficient statement of the case; no points are specifically made, and there is no segregated argument. It does not comply with the rules of this court.

The judgment will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

482 - 29809

239 I.A. 656

LILLIAN SIMMONS,
Appellee,

v.

YELLOW CAB COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit brought by the plaintiff, Lillian Simmons, against the defendants, Yellow Cab Company, Walden W. Shaw Company, and John Luedtke, in the Circuit Court, to recover damages for personal injuries claimed to have been received by her as the result of a collision between a yellow cab, in which she was a passenger, and a touring car belonging to Luedtke. There was a trial, with a jury, and a verdict, finding the defendant Luedtke not guilty, and finding the defendants, Yellow Cab Company and Walden W. Shaw Company guilty and assessing the plaintiff's damages ar $9,000.00. The court having entered judgment in accordance with the verdict, this appeal was taken by the defendant, the Yellow Cab Company.

The evidence as to the accident shows, substantially, the following:- In the early afternoon of December 10, 1921, the plaintiff hired a Yellow cab at Van Buren street and Wabash avenue to take her to the Alexian Brothers Hospital. One Gordon was the driver of the cab. At the

Opinion filed Oct. 28, 1958.

trial, he was not called as his whereabouts were unknown. Gordon drove the cab north, and finally driving west on Belden avenue - an east and west street - entered the intersection of Belden avenue and Clifton avenue, the latter being a north and south street. As Gordon was driving west on Belden avenue, there was a horse drawn milk wagon just ahead of him. He drove to the south of that vehicle and entered the intersection near the southeast corner, that is, south of a line drawn east and west in the center of Belden avenue. At the time, he was driving from 30 to 35 - one witness said 40 - miles an hour. As the cab entered the intersection from the east, a Buick touring car belonging to and driven by the defendant Luedtke, was coming from the south on the east side of Clifton avenue. It was traveling at about 12 to 15 miles an hour. One witness said Luedtke told him he was going from 22 to 25 miles an hour. The two machines collided near the southeast conner of the intersection, the front of the Buick touring car striking the left rear wheel, or the fender of the Yellow cab. According to one witness, the impact was terrific. After the collision the Buick touring car went on towards the northwest, stopping on the sidewalk at the northwest corner of the intersection. The Yellow cab went on west, wabbling from side to side, and finally tipped over on its left side.

The plaintiff testified that at the time of the collision she was sitting in the Yellow cab reading a newspaper and that after the collision, until late that afternoon when in the St. Joseph hospital, she had no recollection of what took place. Immediately after the Yellow cab tipped over, some men, who were there, got on the top and

finally succeeded in getting the door open and the plaintiff out. She was then, unconscious, taken in an automobile to a hospital.

In the brief for the defendants, the Yellow Cab Company, counsel state that no question is raised either as to the sufficiency of the evidence to warrant its submission to the jury, nor "as to the verdict being manifestly against the preponderance of the evidence," but that the main dispute is with reference to the injuries sustained by the plaintiff as the result of the collision.

The plaintiff introduced evidence tending to show that as a result of the accident she suffered various serious injuries, and that in consequence her health has been greatly impaired.

At the time of the accident, the plaintiff was 21 years and eight months old. She was born in Chicago, graduated from grammar school, went two years to high school, after which she went to work. She began with office work, and was afterwards, up to the time of the accident, in the employment of various film companies. In the course of her life, she had suffered a number of operations. When 13 years of age she hurt her left knee and it was operated on. In 1916, she had both breasts removed. The reason given by the plaintiff is that one became infected by means of a pin used in a brassiere, and that she had both removed so as not to look abnormal.

In 1912, she was operated on for appendicitis. Some years before the trial she had had her tonsils removed.

Also, prior to the accident in question, she had a fall and injured her left knee, and was paid compensation therefor at $10.00 a week, for some months, by the American Medical Association for whom she was working at that time. Three or four years prior to the trial, she broke the wiring that had been put in her knee by Dr. John B. Murphy, who operated on her, and Dr. Garvey then operated, taking the wires out. Her testimony is that at the time of the accident she was in good health. Her evidence as to the injuries caused by reason of the accident in question is substantially as follows:- that when she was taken to the hospital they packed her in ice; that her nose was swollen and bruised; that her nose and eyes were black and blue and her face swollen; that she had very severe headaches; that she had very sharp pain in her nose; that one of her shoulders was injured and was painful; that one of her arms was injured so that she had difficulty in raising it; that her chest was hurt and still bothers her; that she still has a black and blue mark on her face and a lump on her cheek; that her entire back ached and bothered her; that she cannot now breathe through her nose; that her nose is now crooked and fallen in. Subsequent to her accident, she was treated by a number of physicians. When she was first taken to the St. Joseph Hospital, her personal history was written down on a formal chart. A copy of that was introduced in evidence. It recites under "Diagnosis" that there was a "fracture of nasal septum." It, also, shows the following: "Injury to head, shoulder, side and knee, sustained when Yellow cab was upset. Complains of 1, Bump on forehead - left side; 2, Tenderness and pain in posterior part of left shoulder. 3 Pain in upper part of nose. 4. Pain left part of chest superficially. 5 More pain in

left knee than there was previous to injury. Patient does not remember details of how accident happened. She was dazed momentarily, but did not lose consciousness." Under the title, Physical Examination, it recites that there was a swelling on theleft side of the forehead, with slight skin abrasion; a slight abrasion over the bridge of the nose and that there was tenderness at that point; that there was pain on pressure, in the left shoulder; that there was a slight tenderness over the 6th and 7th ribs.

She was taken to the hospital on December 10, 1931, and left thereon December 23, 1931. For the next two months, she was treated every other day by Dr. Solovey. He gave her medicine and administered several hypodermics. She went back to work eight weeks after the accident. On December 24, 1931, the day after she left the hospital, she went to Dr. Hayden. There was introduced in evidence a memorandum made at Dr. Hayden's office. It contained the following, "Nose is crooked. Adv. her that there is no break in septum. This has been removed (8 yrs. ago she says) Dr. Porter, Mich. Blvd. Bldg. in office " " " Nose is crooked slightly to left (she says was straight previous to injury). No Sept. or cartilages or bone inside." Under date of January 30, 1934, there is the recitation, "I took her to oper. room, she says cocainized it - then told her there was too much swelling - says no operation was ever done on her nose." She visited Dr. Hayden five or six times in the two months after she left the hospital. On March 2, 1932, at the recommendation of Dr. Solovey, she went to one Thoms, a druggist's physician, who called himself a naprapath. He treated her three times a week until November 30, 1932. He gave her, what he called, a series of scientific

thrusts or pressures on various points throughout the spine, with the idea, as he says, of relieving or stretching out the shrunken condition of certain ligaments and to relieve irritation to certain nerves. His treatment was limited to the spine. Thoma testified that while under his treatment, her nose bled five or six times.

As to her condition at the time of the trial, her evidence is that her left arm, which she could hardly raise at all shortly after the accident, has grown some better, though it still gave her pain, and did so at the time she was testifying; that her spine, which she first noticed after the injury, hurts her all the time, chiefly when she is sitting; that she still has constant headaches; that her nose swells and at times is very painful; that her nose very frequently bleeds; that since the accident, it has occurred about 25 times, though before the accident it never happened; that her nose is crooked, whereas before it was straight; that after she went back to work her eyes were black and blue and quite a few times would swell and fill up with pus; that there is still a mark, a blue lump on the side of one cheek, that was not there before the accident; that she has had fainting and crying spells since the accident; that she was disgusted with living, had so much pain and had to work, and that she had a lot of pain and headaches and did not sleep well.

There is considerable controversy concerning the injury to the plaintiff's nose. Dr. Steffenson, a specialist, who examined the plaintiff in January, 1922, stated

that the nose was then crooked; that the upper part of the cartilage inclines to the right and the lower towards the left; that at the bottom about a quarter of an inch of it was missing; that the right nostril is entirely closed; that the right has an opening in the bottom but none in the upper part; that he found no evidence of any removal of the septum; that it had not been cut out; that there was a lump about the size of a small split pea, that was movable, just beneath the skin, that interfered with air passing through the nose. Dr. Hershfield, a neurologist, examined her in January 1932, and just before the trial. He substantially corroborated Dr. Steffenson. He stated that he found no evidence that any part of the septum had been cut out. He diagnosed the case as one of traumatic neurosis; and said, in answer to a hypothetical question, that the bleeding and fainting spells, headaches, disturbances in sleep could be brought about by the accident in question. Dr. Hayden testified that the cartilage and part of the bone of the septum had been taken out.

He further testifiedthat when she was at the hospital he took her to the operating room, to operate on her nose, but found the swelling too great; that when she was signed out from the hospital, the swelling of the septum was still present, and the nose crooked; that she was signed out, as a fracture of the nasal septum; that he presumed the fractured fragments were present, although the swelling prevented him from seeing them. On cross-examination, he testified that later, in January, he examined her, and, the swelling having receded he found that she did not have a

cartilaginous, but a membraneous septum, that there was no cartilage in the front of the nose; that he thinks she told him that she had her nose operated on eight years before; that that was the way he wrote it down in his record; that the plaintiff, in talking with him shortly before the trial, said that he was mistaken as to what he had written down. He further testified that her nose at the time of the trial - was crooked and about the same as when she was in the hospital.

Five witnesses testified that after the accident the plaintiff had fainting spells; that from time to time her nose bled, and that her nose was crooked, whereas formerly it was straight. They, also, testified that her disposition had changed from being cheerful to being morose.

It is contended for the defendant that the evidence did not sufficiently prove that the plaintiff suffered such injuries as the result of the accident in question to justify the verdict and judgment. It may be pertinent to say at the outset that it is still beyond the power of even the ablest physicians and surgeons to determine with infallible assurance what is or may be the full effect of such a catastrophe; or even what is or may be the full effect of such a shock upon the nervous system itself. It is perhaps pedantic to say that the balance between the functioning of the nervous system and the rest of the organism is such a delicate equilibrium that it may be seriously disturbed by any of almost infinite causes. Considering the impact of the two machines, one going about 20 miles an hour and the other 35, which as

described by one witness, was terrific, together with the turning over of the one in which the plaintiff was a passenger, together with the obvious injuries she then received, all taken in conjunction with what the evidence sufficiently proves as to her physical and nervous condition thereafter, are we entitled to conclude that the verdict as to amount is clearly against the weight of the evidence? Of course, the question arises, may what she was before and would have been without the accident, be segregated from what she was before and actually was afterwards as a result of the accident? That was, though difficult, a matter of fact for the jury. Prior to the accident, she had suffered an unusual number of ailments and operations. Her tonsils, appendix, left knee, and breasts had all been involved. And there is some question about her nose. Still, on the other hand, the history as recorded at the hospital describes her as a "well developed and well nourished young woman," who sleeps well and has a good appetite. And in Dr. Hayden's personal records, it is stated under a date in January, 1931, "No serious illness - pretty well as a rule." Her own testimony and that of many other witnesses is evidence tending to show that as a result of the accident, serious changes took place in her health. It is true that Dr. Krohn, a specialist in nervous conditions, in answer to an hypothetical question, containing a recitation of the pre-accident operations, gave it as his opinion that they were sufficient to produce a neurosis. That speculative opinion, however, as far as it is applicable to the plaintiff's condition, may have been in the judgment of the jury, more than offset by the testimony of the plaintiff and her witnesses as to her former and later

condition.

Considering the youth of the plaintiff and all the evidence as to the injuries resulting from the accident, we do not feel justified in overriding the verdict of the jury as clearly against the weight of the evidence.

As showing procedural errors in the conduct of the trial, two contentions are made for the defendant, one based on a motion to withdraw a juror, and the other, on alleged improper examination of Dr. Hayden. As they, in fact, involve the same subject-matter, they will be considered together.

Dr. Hayden was subpoenaed and called as a witness by the plaintiff. After being subpoenaed, he called at the office of counsel for the plaintiff, and told him that a Dr. Leaming had called him, Dr. Hayden, and spoken to him about the case; and that later the plaintiff called to see him. On cross-examination, he testified that the plaintiff on that occasion told him that he was mistaken when he wrote down in his record that she had told him that her nose had been operated on eight years before the accident; that he said to her, "All right, if it is an error in the way I wrote it down, I will very frankly state to the court * * * that you say it is an error and admit that it might be, although it is written very plainly, with the same ink and everything, that the rest of the history was written." On redirect examination by counsel for the plaintiff, he was asked the question, "When you talked with me (plaintiff's counsel) you discussed settlement, of this case, did you not?" and he answered,

"No, I didn't say anything to you about settling the case. I believe I said something to her." He was then asked by plaintiff's counsel, "Didn't you state that it would be advisable for her to take $2500 - to take the $2500?"and after counsel for the defendant had objected, there was added to the question the words, "which had been offered to her?" At the conclusion of the question, counsel for the defendant, objected, and asked, on account of the statement, to withdraw a juror, stating that the damage was done and could not be cured. The matter was then considered by the trial judge and counsel in chambers. Later, in the presence of the jury, the trial judge announced that the motion to withdraw a juror would be overruled; and counsel for the plaintiff stated to the jury that when he asked Dr. Hayden the question as to whether he advised the plaintiff to accept the settlement of $2500.00 it was not his intention to convey any impression that Dr. Hayden was authorized by the defendant or that the defendant had made any such offer, but solely to show Dr. Hayden's interest in the law suit. After that statement, the trial judge said, "The jury will disregard the question, as asked, or any answer that may have been given by the doctor with reference to it." On further examination by Dr. Hayden, he was asked by counsel for the plaintiff, if he did not say to the plaintiff that if the case was not disposed of, he would ruin her case, and he answered, "She said that you said I would ruin it if I testified." "I stated to her that the testimony I would have to give would be detrimental to her case." "I said so far as her nose was concerned she had no case." "I told her that if she could settle it out of

court, in my opinion, so far as my testimony was concerned, that that would be the best thing to do." When asked if he suggested any particular sum that she should take, he answered, "No, nothing was suggested." At first blush, it would seem that the question, which, by innuendo, implied that the defendant had offered $2500.00, constituted a serious error, and would have justified allowing the motion to withdraw a juror, and would justify a reversal here. But, considering the context, the statement to the jury by counsel for the defense, the directions given by the trial judge to the jury, the later testimony of Dr. Hayden that no amount was mentioned, the right which the plaintiff had to show the interest, if any, which Dr. Hayden had in the suit; and that the burden of his testimony was that as far as her nose was concerned, she had no case, we feel bound to conclude that what transpired cannot reasonably be said to have sufficiently endangered an impartial judgment, based only on the competent evidence, to justify a reversal. The facts in C & A. R. R. Co. v. Thompson, 19 Ill. 577, cited for the defendant, were substantially different from those involved here.

It is contended that the statement, "Why do you insist on using anything that is not a matter of public record? made by counsel for the plaintiff while Dr. Hayden was being examined, and was considering his own memorandum, and, also, the one made by the Hospital, constituted serious error. When the statement was objected to by counsel for the defendant, it was sustained. The statement, as made, was not entirely accurate, although, the hospital records may be said to be quasi-public, as compared with the office memoranda of a physician.

However, we do not think the matter sufficiently substantial to justify a reversal.

It is contended that the conduct of counsel for the plaintiff was such as to make the trial unfair. The law expects and requires honorable conduct on the part of lawyers in the trial of all cases. Paulsen v. Heavey Brewing Co., 220 Ill. App. 273. Bishop v. Chicago Junction Ry. Co., 282 Ill. 63; Hale v. Chicago Junction Ry. Co., 259 Ill. 476; Ill. Cent. R. Co. v. Seitz, 111 Ill. App. 242; Mattice v. Klawans, 312 Ill. 299; North Chicago St. R. R. Co. v. Anderson, 178 Ill. 635; C. C. Ry. Co. v. Donnelly, 136 Ill. App. 204.

We have examined the record carefully, and although it may not show scrupulous care on the part of counsel for the plaintiff, we are unable reasonably to conclude that what took place clearly justifies a reversal.

The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. CONCURS:

THOMSON, P.J. DISSENTING:-

I am unable to concur in the decision of this case, announced in the foregoing opinion. In my opinion, the damages recovered by the plaintiff in this case were materially excessive.

I am further of the opinion that there was serious procedural error in this record which should necessitate the reversal of the judgment and the remanding of the cause for another trial, entirely apart from the question of damages.

While one of the doctors who had treated the plaintiff was on the stand testifying, (counsel for the plaintiff claiming that he was a hostile witness) he was asked by counsel for the plaintiff whether, when he, the witness, had talked with counsel, he had not discussed settlement of the plaintiff's case and the witness answered to the effect that he had not said anything to counsel about settling the case, but he believed he did say something to the plaintiff herself about it. Counsel then asked the witness this question: "Didn't you state that it would be advisable for her to take $3,500,- to take the $2,500, (here counsel for the defendant objected, saying, "wait a minute I object to that, but counsel continued with his question) which had been offered her?" Immediately counsel for the defendant renewed his objection and asked to withdraw a juror "on account of that statement, - the damage is done and cannot be cured." At this point the jury was excluded from the room and a discussion took place between the court and counsel, after which the jury returned and counsel for the plaintiff then stated that when he asked the doctor the question referred to, "it was not my intention to convey any impression to this jury that Dr. Hayden was authorized to do so on behalf of the Yellow Cab Company, or that the Yellow Cab Company made any such offer or had anything to do with it. My sole purpose was to show his interest in the law suit." The court then said, "The jury will disregard the question as asked or any answer that may have been given by the doctor with reference to it."

In my opinion, the damage which was done by asking such a question was not such as could be cured by any amount

of explaining by counsel or instructing by the court. Here was a damage suit against the Yellow Cab Company and by means of this question the jury had been given a clear intimation that this plaintiff had been offered $2,500 in settlement of her claim. That the damages which the jury ultimately awarded her were materially excessive is not to be wondered at.

491 - 29908

FERDINAND EMICH,

Appellee,

v.

CITIZENS TRUST & SAVINGS BANK,

Appellant.

239 I.A. 656

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Ferdinand Emich, having hired a box in a Safety Deposit Vault, owned and conducted by the defendant, Citizens Trust & Savings Bank, and claiming that its contents had been taken without his consent, on September 15, 1921, brought suit, and recovered a verdict and judgment in the sum of $7,085.00 and costs. This appeal is therefrom.

Voluminous pleadings were filed, but it is only necessary here to refer to the second original count of the declaration, and the fourth amended count. They charged the defendant with negligence in the conduct and operation of the Safety Deposit vault. To these the defendant pleaded the general issue. At the trial, which was before the court, with a jury, thirteen witnesses testified.

The evidence of the plaintiff is substantially as follows: The plaintiff, who had a restaurant at 5800 South La Salle street, and who formerly for 17 years had conducted a butcher business, had a safety deposit box

Opinion filed Oct. 29, 1925.

in the defendant's bank premises for which he paid $2.00 a year. He had had a box there for three years, and a checking account since 1931. On June 30, 1931, in the morning, he went to the defendant's place of business, hereinafter called the bank, and taking certain checks which he had received from employees of the Pullman Company, with whom he did business, had one Brubaker, the teller, cashthem. Not having endorsed them, about one o'clock, Brubaker called him up and asked him to come over and sign them. He went back to the Bank at 1:30 p.m. and had the checks endorsed, made a deposit, and after being at the teller's cage three or four minutes, he went through the first entrance of the safety deposit vault, wrote his name in the register, and then tried to go into the vault itself. An employee of the Bank, Miss Dolan, tried several keys, the plaintiff pulled hard on the door, which led to the boxes, and finally it came open. The plaintiff stepped aside, and let two women in. Miss Dolan had a key and he had a key. He had never seen Miss Dolan before. A Miss Kessler was the regular vault attendant and it was her duty to sit at the door and let customers in. He got his box out of its place and went into booth numbered one, which was outside of the vault itself. He put some currency into his box, making its contents - which he then counted and marked down on a slip - $7,000.00, and a Liberty Bond of $100.00. It was stipulated that the bond was then worth $85.00. No serious question is made that the amount the box contained was not equal to the amount of the verdict. He then took the box, put it back in its proper recess, and locked the door. During the time he had

been in the booth his key remained in the door of the compartment in the vault which opened into his box. After putting his box back into his compartment and locking the door, he went out, got into his automobile and went away. That was about three minutes before two, the time at which the vault was closed for the day. The next morning he was called up from the Bank and asked to go over there, that his box was outside of its regular place. He answered that it could not be his, as he had locked it up. He went over, saw the box in question; said it was not his, and asked them to open the vault, that his box must be there. It was opened, and the place where the box was supposed to be, was empty. He then found that the box that was outside was his. He asked Cottle, the vice-president, how it came there, and Cottle said, you must have left the box outside. The plaintiff answered, "How could I put it back?" He further testified that Cottle told him he had to discharge one Harry Hunter, the cashier, because he was always out drinking and was a ladies man. And further, he testified that anybody could open the vault door; that you just reach from the outside; that he opened the door himself; that there was no attendant there; that he stood by the book to register until the girl, who was strange, came out.

His evidence on cross-examination, was that when he went back, after being in the booth and putting money in his box, everything was wide open, and he pushed his box back in the proper drawer; that it is not necessary for the attendant to put her key in the box, when it is locked; that when

he went back from the booth the door of the vault was open and he put his box back in its place, slammed the door shut, took the keys and went home; that when he rented the box he was given two keys; that he carried one and left one at home; that shortly prior to the time in question, the bank had installed new boxes and booths. He further testified that he was sure he did not leave his box in the booth; that on the morning that he went back, the door to his box worked all right.

The only other witness who testified to the plaintiff's presence and what he actually did at the time in question, was Mabel Dolan, who was employed by the Bank as a switchboard operator. She had been employed by the Bank for about a year, and before she worked on the switchboard she had worked in the vault, under Miss Kessler. She occasionally relieved Miss Kessler (at the time of the trial, Mrs. E. J. Kendall), who was the regular custodian of the safety deposit vault of the bank. On the day in question, from 1:30 to 2 p.m., Miss Kessler, who was engaged in writing some return checks, on the other side of the Bank from the vault, turned over the charge of the vault to Mabel Dolan, and gave her the master key. The evidence of Mabel Dolan is that about one o'clock she entered several customers, among them the plaintiff, into the safety deposit vault; that a customer had to sign his name in a book, also the attendant, before the customer went in; that the plaintiff came, signed his name and was let in by her; that she let in several persons after him; that she did not remember the booth the plaintiff used, nor remember

seeing him come out of the booth; that the plaintiff put his box back by himself; that she did not put it back for him; that after letting these people in, after the plaintiff had left, she turned over the master key to Miss Kessler. On cross-examination she testified that she knew the plaintiff and had often seen him at the bank; that she did not see him put his box back; that when she took care of the vault the customer put his own box back and pulled his keys out; that she did not go into any of the booths on June 30; that the plaintiff on that day took his box out of its compartment and left the door open and his keys in the door; that there was only one pass key for all the boxes; that when she opened the plaintiff's box, she took the pass key right out; that if the plaintiff left the door open he would have to leave the keys in his box; that he did leave the door open with the keys in. When called for the defendant, she testified there was a key to the vault door, which was inside the main time-lock door, which key, when she was attendant, when she got through in the evening, she put in a desk which locked automatically; that when there were no customers inside of the vault, the inner vault door was locked; that it locked when slammed to; that she never examined any of the booths and was never told to do so; that at night the master key was put in a drawer in a desk, and the desk locked.

The witness, Miss Kessler, who was the regular custodian of the safety deposit vault, and who, being engaged with other work at the time in question, gave the master key to Mabel Dolan, who then had charge of the vault when the plaintiff used his box between 1 and 1:30 p.m. on June 30,

gave evidence as to what was done, generally, in regard to the customers, their boxes,and the vault. She testified that there were no printed or written rules; that she received some instruction from the man who was there before she was; that any one who came to the vault had to sign his name in the book, and she had to sign her name after it, to show that she waited on him; that there was a rule that the attendant was to put the customer's box back after the customer was through with it; that the plaintiff came to the bank some times every day, some times every other day; that there was a rule that no more than one person should be allowed in the vault at one time without the vault attendant being present; that in her practice, the customer would go with her into the vault and she would put the box back in its compartment, lock it for him, and hand him the key. Miss Leftwich, head-bookkeeper, corroborated Miss Kessler as to the way in which customers were served as to the vault and their boxes and keys; and stated that nearly all the girls helped Miss Kessler from time to time, and all tried to carry out the same procedure; that the rules were given her by Cottle, the vice-president of the Bank.

Miss Kessler further testified that on the day in question Miss Dolan had charge of the vault from 1 to 1:30; that she, herself, let no one in the vault that day after one o'clock; that she closed the vault door that day at the closing of the bank, about 2:30; that she did not go through the booths that afternoon, although she had formerly done so of her own accord; that when she got to work the

next morning - the day after the plaintiff had last been there - she found the plaintiff's box lying on her desk - which was apparently in the vault - and found a sheet of paper with his name on it; that she then foundthe number of his compartment from the vault book, and went into the vault and found his box was closed; that she then called him up by telephone and asked him if he had been in the vault the day before; that he answered, yes, and then she told him that she had found a box on her desk with a paper with his name on it, and said further, "I do not know whether it belongs to you or not;" that he said, "Oh, no, that could not be mine, Miss Kessler, because I know I locked the box;" that the plaintiff then came at once to the Bank, and she opened his compartment, and it was empty, with no box in it; that the plaintiff said he had lost something like six or seven thousand dollars; that that morning, plaintiff's box opened in the usual manner; that the plaintiff said he was positive he had put his box back; that after she had called up and seen the plaintiff, she reported the loss to Mr. Smith, the President, or to Mr. Cottle. She further testified that she did not know how the box could be opened between the 30th and the next morning, because it was locked when she went there the next morning and the only way you could get in was by the plaintiff's key.

The registry of the Safety Deposit Vault shows that on June 30, 1921, eighteen different persons signed for entrance, and used the vault. Miss Dolan signed as attendant for four, Miss Kessler for nine, and a Miss Sachs for

four. Miss Clancy, who was transit clerk, and Miss Leftwich, head bookkeeper, testified that they also some times let customers in the vault. Alice Veale, a public school teacher, testified that on June 30, 1921, about 1:45 p.m., she went to the Bank; that she rang the vault bell; that she signed her name, and got her box, left her keys hanging in the door, and went to a booth; that when she got through she, by herself, took her box to its compartment; that she did not see the attendant when she put her box back. Leona C. Earl testified that on June 30, 1921, she had a box at the Bank; that the attendant always took her key and, together with the other key opened the box for her.

The vault had a door 3 by 6½ feet, and 4½ inches thick. It was operated by a time lock combination, and would open only at the particular time for which it was set. It was generally locked about 5 p.m., to open at 8 the next morning. There was an electrical alarm system which connected it with the Police Station, so that it was known there when it was open and when it was closed.

There is some evidence by Smith, the president of the Bank, as to conversations he had with the plaintiff about a week after June 30, 1921. Smith testified that theplaintiff told him he had had trouble with Cottle, vice-president, that he, the plaintiff said he had used his box and then overlooked putting it back and that it had $6,000.00 or $7,000.00 in it; that he said he might have had a drink or two too much and forgot to put it back, and that the girl called him up the next day and

told him his box was out and when he went over, the money was gone; that he, Smith, told him he would investigate the matter, but that the Bank was not responsible if he left his box lying around. Smith, further, testified that the talk he had with the plaintiff was from a week to 9 or 10 days after June 30, 1921, and that the first he knew of the loss was when the plaintiff then spoke to him; that Cottle, the vice-president, had not told him.

One Milne, an employee of Pinkerton's National Detective Agency, which agency had been employed by the plaintiff to make an investigation, testified that he looked into the matter and made a report; that he had several conversations with the plaintiff; that they were confusing; that the plaintiff did not seem to be sure that he put the box back; that, first, he made the statement that he did, and later that he had left it out. He testified, referring to his first report of the matter, as follows:

> "Refreshing my memory from this, the first statement I recall that he made is that he took - he got the box out of the vault and went into a booth; took some money out of the box, put it in his pocket and walked towards the door and when he got to the door he missed his key. I don't remember whether he had left the bank or not, but when he reached the door he missed his key, and came back, not to the booth but to the vault, where he found his keys hanging in the vault compartment. He locked the compartment and then left the bank."

The testimony of this witness is confusing, first he testified that the plaintiff first told him that he did put it back, and then, he testified, further on, that the plaintiff first told him that he did not. The plaintiff

testified that he did not remember telling any one that he left his box in the booth, nor that he ever walked out of the Bank leaving his keys in the box.

The evidence shows that on June 30, 1921, when the plaintiff went into the vault, two other customers, Miss Veale and Miss Weare were admitted at the same time, and after they went in Miss Dolan, the attendant, went back to the switchboard.

At the close of the evidence, certain instructions were given to the jury, and they were instructed, at the request of the defendant, to find specially whether the plaintiff on June 30, 1921, left his safety deposit box in a booth in the Bank. When the jury returned its verdict for the plaintiff, it, also, returned the finding, "No, he did not leave it in the booth."

The question arises at the outset, whether the finding of fact by the jury that he did not leave his box in the booth is against the manifest weight of the evidence. The plaintiff said he took his box back and put it in its proper compartment, and there is no substantial evidence to the contrary. Considering that the compartment was found the next morning properly locked, and that there is no question but what the plaintiff had his key, it is a fair inference that after he took his box to the booth, he went back and shut the compartment and took his key. Could he have gone back and shut and locked it and taken this key, and yet have left his box in the booth? That could have been done, but it is ordinarily highly improbable.

The detective, Milne, in his testimony gives some evidence to the effect that the plaintiff made some confusing statements, (1) that he was not sure where he left the box, (2) that he put it back, and (3) that he started to leave or had left the Bank, and missed his key, then went back and looked his compartment and took his key. Miss Dolan says the plaintiff put his box away himself, though she did not see him. Miss Kessler says there was a rule that the attendant should put the box back and that it was the attendant's duty, though Miss Dolan said that when she took care of the vault, the customer put his own box back. Miss Kessler said she used to go, of her own accord, through the booths at night, to see if anything had been left there. She further said that when she called the plaintiff up the next morning and told him his box was out that he said that it could not be as he had locked his compartment; and that when he came over that morning, he was positive that he had put the box back. It will be seen, therefore, that the finding of the jury that the plaintiff did not leave his box in the booth, cannot reasonably be said to be clearly against the weight of the evidence. The fact that there is no explicit evidence as to how the box that night was abstracted from its compartment, if it was at that time abstracted, is not necessarily any evidence that it was not put back.

Was there any obligation on the plaintiff to show how the property was taken?

The vault was in the custody of the defendant, and

assuming, as we do, as the jury found, that the box was put back, it was then the obligation of the Bank to show that, as to taking care of its customer's property, it did all those things which ordinary care - considering its particular situation as a bailee for hire, which held itself out as offering a vault for the safekeeping of valuable personal property, and proclaimed itself as in the business of conducting a safety deposit vault - required. Ordinary care in the conduct of a safety deposit vault for hire means something far more meticulous than is involved in an ordinary, conventional gratuitous bailment. Its very essence, its raison d'etre is care. Gray v. Merriam, 148 Ill. 179; Preston v. Prather, 137 U. S. 604; Merchants Nat'l. Bank v. Guilmartin, 93 Ga. 503.

In Schaefer v. Washington Park Bank, 281 Ill. 43, the court said:

> "The plaintiff * * * was bargaining for safety * * * and for the exercise of such care as a reasonably prudent man would exercise towards the safety of like property of his own under like conditions. * * * The undisputed evidence was that the box was in the exclusive control of the defendant and that the plaintiff could not obtain access to it except by signing a slip at the office giving her name to the person in charge of the vaults. Under such conditions we see no reason to depart from the ordinary rule that where a bailee receives property and fails to return it, the presumption arises that the loss was due to his negligence, and the law imposes on him the burden of showing that he exercised the degree of care required by the nature of the bailment. (Cummins v. Wood, 44 Ill. 416; Bennett v. O'Brien, 37 id. 250) To call upon the plaintiff under such circumstances, to prove some specific act of negligence by which her money was lost, and which she must necessarily prove by defendant's employes would impose upon her practically an impossible burden."

In reality, the same principle is involved in

Bauman v. Natl. Safe Dep. Co., 124 Ill. App. 419, which was a suit against a deposit company for money mysteriously taken from the plaintiff's box; but there, as the defendant introduced sufficient evidence of care, and the jury found for the defendant, the court affirmed the judgment, and said, "It was a question for the jury whether the defendant exercised ordinary care in the premises." Mayer v. Brensinger, 180 Ill. 110; Masonic Temple Dep. Co. v. Longfelt, 117 Ill. App. 656; Chicago German Hod Carriers Un. & Ben. Society v. Sec. Tr. & Dep. Co., 315 Ill. 204; Preston v. Prather, 137 U. S. 604; Evans v. N.Y. & P.S.S. Co., 163 Fed. 405; Cussen v. S. Usl. Sav. Bank, 133 Cal.534.

The conspicuous facts evidencing want of care are as follows: (1) the master key was used by any one of a number of employees, besides Miss Kessler the regular vault attendant, such as, Dolan, Sacks, Leftwich and Clancy; (2) apparently, not much attention was paid to the vault door being open or closed during banking hours; (3) the rule testified to by Miss Kessler that the attendant should see to the putting back of the customer's box was violated, Miss Dolan who let the plaintiff in, testifying that she did not go back with him to put his box in, and intimating that she never followed that practice; (4) the rule that no more than one person at a time should be allowed in the vault without one attendant being present was violated; (5) shortly prior to June 30, a new set of boxes was installed, the keys of which until delivered to the customers, were kept in an unlocked drawer just outside of the vault; (6) Harry Hunter, cashier, who had been

asked for his resignation about the first of June, his resignation to take effect at the end of the month, on account of his bad habits, drinking and being "a lady's man," in and about the Bank, on that day.

In passing on all the evidence, the jury found that the defendant was guilty of negligence; and, bearing in mind what it shows, we do not feel that we can reasonably say that that judgment is clearly against the weight of the evidence.

It is contended that the only pleadings on the part of the plaintiff that could support the verdict were the second original count of the declaration and the fourth amended count, both of which charged that the defendant negligently, carelessly and improperly managed, operated, conducted and controlled the safety deposit vault, in such a manner as to cause and permit the contents of the plaintiff's box to be lost or stolen; and that no particular negligence on the part of the defendant, which would necessarily account for the loss of the plaintiff's property, was shown; that as the declaration charged negligence, and did not rest merely on the naked contract of bailment and loss, it was necessary for the plaintiff to make sufficient preponderating proof of negligence, qua negligence. Some courts have held that there is a difference in the necessary quantum of proof in the two cases, as in Metropolitan El. Service Co. v. Walker, 226 Pac. 1042, but here, as the jury found negligence, and as we have said, we are not justified in disturbing their verdict, the distinction between the two classes of cases is not

involved.

It is contended that the defendant was prejudiced before the jury by certain statements of counsel for the plaintiff, and by certain questions put concerning cashier Hunter. In his opening statement counsel for the plaintiff stated that at the time in question the Bank had a cashier named Harry Hunter, who had been cashier for sometime, and that on July 1, the day following the disappearance of the money, Hunter was discharged; that "He was investigated and denied any knowledge of this money, but he did admit, and the evidence will show that he admitted, that he left the bank on that day at two o'clock * * * right after Mr. Emich left there, and did not return to the bank until after four thirty". Counsel further said, "Probably Harry Hunter will be here, and we will find out all we can about him at that time. At any rate, Harry Hunter was discharged on July 1, the next day after this money disappeared from the box. The evidence, I believe, will show that Mr. Cottle, who was Vice-President of the bank at the time when this money disappeared, or a day or so after that, made the statement that Harry Hunter was discharged as cashier by the bank for the reason that he did not attend to business, for the reason that he drank too much and ran around with women too much, some of whom were employees at the time, but the evidence, I believe, will show you that some three months after June 30, 1931, Harry Hunter was arrested and charged with tipping off a pay roll robbery of the Ward Baking Co. That was the latter part of 1931. I think he was indicted on that

charge." The record shows that counsel for the defendant then said, "We object to what you think you are going to prove," and that the objection was sustained.

Miss Kessler testified, when asked if Hunter was cashier on June 30, 1931, that she believed he was. When asked if she knew of her own knowledge of any trouble that Hunter was in after June 30, 1931, she answered in the negative. To the latter, counsel for the defendant objected on the ground that there was no testimony that Hunter was in any trouble, and that objection was sustained. Counsel for the plaintiff asked the witness Miss Dolan whether or not he was cashier on June 30, and she answered in the affirmative. He then asked her, "Do you know anything about Harry Hunter being connected with any pay roll robbery of the Ward Baking Company?" To that, counsel for the defendant objected. The court then said, "Just yes or no." The witness answered, "Yes". Counsel for the plaintiff then asked, "What do you know about it? and counsel for the defendant objected, without giving any reason, and the court then said, "Objection sustained." Counsel for the defendant then said, "Such a question is highly prejudicial." Counsel for the plaintiff said, "I never saw this girl before in my life. I want to find out whether or not she knows he made a confession or not, or was indicted." To that, counsel for the defendant responded, "Whether she knows or not will not prove the fact, and even the proof of the fact would not be material." Counsel for the plaintiff then said, "I suppose if she does, it would be hearsay." The follow-

ing question was then asked by counsel for the plaintiff, "Do you know anything of it of your own knowledge except what you have heard in that regard?" The witness then answered in thenegative. She then further said, in answer to two other questions, that she did not know anything about it for sure, and what she did was what she had heard.

At the close of the plaintiff's case, counsel for the defendant said, "I think there is one motion that would be proper, and that is that at this time all the evidence of the witnesses in respect to Harry Hunter should be excluded, because it has not been connected up in any way. It has been left in as a statement or inference without any proof." Counsel for the plaintiff then said, "There is no evidence on it. I asked a few questions, but there were no answers given." Counsel for the defendant then said, "My motion is to exclude all the testimony from the jury concerning Harry Hunter's complicity in any pay roll robbery," and counsel for the plaintiff responded, "I do not think that there is any evidence on that." The court said, "There is but very little. There was simply one question and one answer, whether one witness knew anything about that, and she answered yes to that question, and further examination disclosed all she knew about it was from hearsay." The court then further said that he would allow the motion and "any evidence in the record with reference to the complicity of the cashier, Harry Hunter, in any pay roll robbery should be disregarded by the jury."

Smith, who had been President of the bank for fifteen or sixteen years, and who severed his connection therewith in the fall of 1921, testified that Hunter had been cashier of the bank for 2, 3, or 4 years. He was then asked by counsel for the plaintiff on cross-examination whether he had a conversation with Hunter "about his connection with a pay roll robbery of the Ward Baking Company along in the fall or summer of 1921." Counsel for the defendant objected to that question without giving any reason, and the court sustained the objection. On the heels of that, counsel for the plaintiff said, "I will ask to make the witness my witness on that question," to which counsel for the defendant said, "Finish your cross-examination first." There then occurred a colloquy between court and counsel as to whether counsel for the plaintiff had a right to make the defendant's witness the plaintiff's witness while the defendant was putting in its case; at the end of which the court sustained the objection made by counsel for the defendant to making the witness the plaintiff's witness at that time.

The evidence showed that about June 1, 1921, Smith, the President, asked Hunter, the cashier, for his resignation, and that he resigned as of June 30, 1921, and so was still cashier on the day in question. Plaintiff testified that Cottle, the Vice President, told him he had to discharge Hunter because Hunter was always out drunk and was a ladies man. At the trial, Hunter was not called; and one Staver, a Director, testified that he had been trying to find him but was unsuccessful. Cottle, who

at the time of the trial was in California, was not called, nor was his deposition taken. As Hunter was cashier and the time of his service did not expire until the close of June 30, and he was at the bank on that day, the plaintiff was entitled to introduce evidence as to his character and fitness, especially as his discharge was brought about as the result of his bad habits. Of course, counsel for the plaintiff would not be entitled to show anything that Hunter did after that date. Counsel for the plaintiff argues that at the outset of the trial as to the charge of the employment of incompetent, unfaithful and dishonest employes they expected to put in proof on that score, but as the trial progressed and Hunter could not be obtained and they were unable to prove those charges, those counts were withdrawn and the jury instructed to disregard the evidence on that subject. No evidence was introduced to show that Hunter had been connected with any robbery. The question arose whether what counsel said to the jury in his opening statement and the questions that were put, none of which elicited any evidence as to Hunter, constituted error. There is no doubt that the words involved, both in the statement and the questions, ought not to have been uttered in the presence of the jury. It is true that what counsel said and the answered questions were not evidence. But in examining the record and considering this matter, it does not appear that counsel for the defendant at any time took the position that the subject of the statement and questions was not proven and was immater-

ial. No motion was made to withdraw a juror; and the subject in the course of the trial was only treated either as objectionable on the ground of hearsay or immaterial, or that it had not been proven, although it is true that on one occasion counsel stated that it was prejudicial, but following the latter statement, the jury was instructed, on motion of counsel for the defendant, to disregard it.

Considering, therefore, the way the matter was treated in the course of the trial by counsel for the defendant, we do not feel justified in holding that what took place on that subject should now be considered here as constituting sufficient error to justify a reversal of the judgment.

It is contended that the court erred in refusing to permit the defendant to prove by Milne, the detective, a conversation it was claimed he had on July 2, with one Moberly, the janitor or porter of the Bank. At the time of the trial Moberly was dead; and as the conversation with Moberly took place out of the presence of the plaintiff, it was evidently incompetent. That Milne, as an employee of Pinkerton's National Detective Agency, which agency was retained by the plaintiff to make an investigation, had a conversation with Moberly, does not mean that in so doing he was binding, or affecting the plaintiff in any way by what Moberly said. He had no such authority.

It is contended that a mandatory instruction given for the plaintiff was erroneous because it did not recite that the negligence referred to was such as resulted in the loss of the plaintiff's property. Having in mind the fact that the instruction when it used the word negligence, qualified it by stating, "as defined by these instructions," and there was another instruction, one given for the defendant, which contained the words, "whether the defendant did or did not exercise ordinary care and diligence to safely keep the property deposited by the plaintiff and return it to the plaintiff is a question of fact to be determined by the jury, and if you believe from the evidence that the plaintiff has not proved by a preponderance of the evidence that the defendant failed to exercise such ordinary care and diligence and by reason of failing to exercise such ordinary care and diligence the money became lost, then you should find the issues for the defendant," it does not seem reasonable to hold that the jury might have been misled. Critically considered, it would have been better to have included in so many words the element of negligence resulting in loss to the plaintiff, but we do not think their absence such error as to justify a reversal. The case was tried on the sole issue of negligence resulting in loss, and the two instructions, taken together, carried the proper principle of law to the jury.

After carefully considering the record and the able briefs of counsel, we are of the opinion that

the judgment must be affirmed.

AFFIRMED.

O'CONNOR, J. CONCURS;
THOMSON, P.J. DISSENTING:

I am unable to concur in the decision of this case, announced in the foregoing opinion. As I view the evidence the special finding of the jury, to the effect that the plaintiff did not leave his box inthe booth, is against the manifest weight of the evidence. The plaintiff's own confidential agent, Milne, a Pinkerton detective, engaged by the plaintiff at the time he lost his money, to investigate the circumstances, testified that in a talk he then had with the plaintiff, the latter stated he was not sure where he had left his box, and then he made a statement that he had put the box back in the vault and "he made a statement later that he recalled that he had left it out." This witness also testified that theplaintiff told him that after leaving the bank, or when he reached the door of the bank, he returned to the vault compartment for his key and that he recalled that he then locked the door of the compartment. The witness was asked whether he remembered that the plaintiff said that he left his box out, and he answered, "He made such a statement, yes sir." On cross-examination, refreshing his memory from a memorandum made by him, he testified that the plaintiff said, he "got the box out of the vault and went into the booth; took some

money out of the box, put it in his pocket and walked towards the door and when he got to the door he missed his key * * * and came back, not to the booth but to the vault where he found his keys hanging in the vault compartment, and locked the compartment and then left the bank." I am unable to find anything uncertain about the testimony of this witness, as stated in the course of the majority opinion. The president of the bank, Smith, testified that within a week after the plaintiff lost his money he had a conversation with the plaintiff, in which the latter stated that "he had gone into his safety box and booth and then overlooked putting the box back and left the box that goes into the pocket, in the booth, with $6,000 or $7,000 in it. * * * I told him that was a rather unusual thing to do. He said he might have had a drink or two too much and forgot to put it back." If the plaintiff left the box in the booth, (and I believe the evidence shows he did) his own gross negligence materially contributed to the loss of his money, and, in my opinion, he should not be permitted to recover, without regard to the question of any alleged negligence on the part of the bank's employees.

I am further of the opinion that, entirely aside from the merits of this case as shown by the evidence, the judgment appealed from should be reversed and the cause remanded, by reason of serious procedural error which occurred during the trial. The first such error

had to do with a question put to several witnesses by counsel for the plaintiff. This question referred to one Hunter, who had been connected with the bank for some time, as its cashier. The president of the bank testified that Hunter's duties were "new business and selling securities." He further testified that a month previous to the time the plaintiff suffered the loss of his money, Hunter had been asked to resign and that he had resigned, "but, under the system at the bank we gave the employees two weeks or a month's pay. Hunter resigned the same day he was asked to, which was the first part of June, and the plaintiff's loss was suffered on June 30. The president of the bank testified that between June 1 and July 1, Hunter was around the bank very little and he recalled that he was down at the bank on the 30th "just to clean up some things around his desk." The first time counsel for the plaintiff put the objectionable question, to which reference has been made, was when the witness, Mabel Dolan, was on the stand. Counsel's question to her was: "Do you know anything about Harry Hunter being connected with a payroll robbery of the Ward Baking Company?" That question was immediately objected to. The court directed the witness to answer yes or no; and she answered, "yes", whereupon she was asked what she knew about it. Again objection was interposed and sustained; counsel for the defendant remarking, in connection with his objection, "Such a question is highly prejudicial," and further that, "whether she knows or not will not prove the fact and even the proof of the fact would not be material." The witness then added

that she knew nothing about the matter except what she had heard. At the close of the plaintiff's case, on motion of counsel for the defendant, all evidence with regard to the complicity of Harry Hunter in any pay-roll robbery, was stricken and the jury was instructed to disregard it. Notwithstanding that fact, when the president of the bank was on the stand testifying for the defendant and being cross-examined near the close of the trial and shortly before the issues were submitted to the jury, counsel for the plaintiff in cross-examining the witness, put this same question again in the following form: "Did you have a conversation with Harry Hunter about this connection with a pay-roll robbery of the Ward Baking Company along in the fall or summer of 1931? Again objection was interposed and sustained. It will be noted that the time referred to in the question was after the plaintiff had lost his money at the bank. In my opinion, no amount of objection on the part of counsel for the defendant or favorable ruling thereon, or instruction to the jury to disregard the evidence, could wipe out the damage done when these questions were asked. The plaintiff had lost $7,000 from his safety deposit box in the defendant's bank and when, by these questions, the jury was given the idea that an officer of the bank, who had severed his connection with the bank about the time the plaintiff's money was lost, was possibly later indicted for tipping off a pay-roll robbery, there could be only one result, as far as the jury's verdict was concerned, in spite of the fact that there is not a syllable of evidence in the entire record in any way connecting

Hunter with the loss of the plaintiff's money or even with the vault of the bank, or that branch of the bank's business. In my opinion this error alone is sufficient to warrant a reversal of the judgment appealed from.

The same is true, it seems to me, with regard to an instruction which the court gave, in substance, to the effect, that if they believed from a preponderance of the evidence that the defendant had been negligent "or failed to exercise ordinary care and diligence as defined by these instructions, in the custody and preservation" of plaintiff's money, and if they further found, from a preponderance of the evidence, that the plaintiff was not negligent, then they should find the issues for the plaintiff. This was a peremptory instruction. It was entirely silent upon the necessary element in the plaintiff's case, namely, that it was necessary, before the plaintiff could recover, that the jury also believe, from a preponderance of the evidence, that the negligence of the bank, if any were shown by the evidence, had been the thing that had caused or materially contributed to the loss of the money. In attempting to meet the contention that the giving of this instruction was error, counsel for the plaintiff relied on the phrase, "as defined by these instructions," and calls attention to another instruction in which the court told the jury that whether the defendant did or did not exercise ordinary care, was a question of fact to be determined by them and if they believed "from the evidence that the plaintiff has not proved by a preponderance of the evidence that the defend-

ant had failed to exercise such ordinary care and diligence, and by reason of failing to exercise such ordinary care and diligence, the money became lost, then you shouldfind the issues for the defendant." It is quite clear that the giving of the latter instruction would have no effect upon the former. Although referringto the same subject-matter they were upon entirely different phases of it. The last instruction referred to does not even purport to be a definition of "ordinary care and diligence." The giving of the instruction complained of was very damaging, and being erroneous, should, in my opinion, cause a reversal of the judgment, because the evidence does show that the defendant bank ran its vault in a rather loose fashion in a number of particulars, but it is also perfectly clear that such negligence, in at least some of such particulars, could have had no possible connection with the loss of the plaintiff's money. It was, therefore, particularly important that if the jury were to be given such a peremptory instruction as the one here complained of, it should contain the very element on which it was silent.

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118 - 29933

EDWIN H. MANASSE,
Plaintiff in Error,

v.

B. W. KREJCI,
Defendant in Error.

239 I.A. 657

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Manasse, brought suit against the defendant Krejci, on a judgment note for $188.00. A judgment by confession for $198.73 was entered in the plaintiff's favor. On motion of the defendant the judgment was opened up, and the defendant filed an affidavit of merits. There was a trial, before the court without a jury, and a judgment in favor of the defendant, and against the plaintiff for costs. This appeal is therefrom.

The evidence shows substantially the following:- One Glatter, who was in the real estate business, and who had gotten into trouble by using some one else's money and needed $300.00 to keep him from going to jail, borrowed $300.00 from the plaintiff. Glatter told the plaintiff that he, Glatter, had that amount coming from the defendant Krejci, as real estate commissions. Glatter gave the plaintiff his own note for $300.00. It was dated October 18, 1923, and was due ten days thereafter. The note was introduced in evidence. The plaintiff testified that

Glatter offered to get the defendant to sign the note, but that he refused, and that later Glatter brought him, the plaintiff, a new note for $182.00, which was signed by the defendant, payable to Glatter and endorsed by the latter; that he, the plaintiff, took that note as security for the $200.00 note of Glatter; that at the time he took the $183.00 note, or a little later, he took, as security, a bill of sale of certain office furniture of Glatter. It was admitted by counsel for the plaintiff that the latter still had the furniture. The defendant Krejci, testified that on October 16, Glatter was in trouble as the result of spending a real estate commission; that the plaintiff sent over a note for $200.00 for him to sign; that he, the defendant, refused to sign it but made out one for $182.00 so as to accommodate Glatter. His testimony suggests that he fixed the amount at $182.00 because Glatter had an interest in certain real estate commissions to that extent. He further testified that he understood a chattel mortgage on Glatter's office furniture was given and that as the plaintiff was of the opinion that the furniture was not worth $200.00, he accommodated Glatter to the extent of $183.00.

Evidence was offered as to the value of the furniture which the plaintiff admitted he still had in his possession. The defendant testified that Glatter had been offered $450.00 for it; and that its fair cash market value was $200.00.

The plaintiff testified that he had had possession of the furniture all the time under a bill of sale. The only evidence as to its value was that of the defendant. Counsel

for the plaintiff in the course of the trial, said, "We still have the furniture and he can have it if he will send us $15.00 for it."

From the foregoing it will be seen that the plaintiff was first given a $200.00 note by Glatter and that he took as security a chattel mortgage or bill of sale of certain personal property, and that later the defendant signed a note for $182.00, payable to Glatter, and which was endorsed by the latter; and then given to the plaintiff.

Even if the $182.00 note was given to the plaintiff as an accommodation for Glatter, and has not been paid, the question still arises whether, the plaintiff having in his possession certain personal property of Glatter, under a bill of sale (chattel mortgage) to secure the $200.00 note he is entitled to sue on the $182.00 note without first exhausting his rights to the personal property. The evidence does not show that the plaintiff has reduced that property to money so that the defendant might claim there was a credit on his note. The mere possession by the payee - of an accommodation note - of personal property belonging to the one accommodated, here a third person, does not prevent the payee from pursuing his remedy on the note against the maker. The note is evidence of the debt. Collateral security is a purely incidental matter, giving rise to a different set of rights and obligations. Tooke v. Newman, 75 Ill. 215. Glatter who borrowed $200.00 from the plaintiff and gave therefor, first, his note for $200.00 and a chattel mortgage and, second, gave the plaintiff as further security the $182.00 note of the defendant, is not a party, and is not

here contending that he has paid his debt. But, it is urged that the personal property held by the plaintiff has paid the defendant's debt. There is no evidence that it has. This is not a suit in equity. Whatever rights may exist in Glatter in regard to the personal property in the possession of the plaintiff, the defendant here may be subrogated to. Those rights, however, do not make out a legal defense to a suit at law on the note. Though an accommodation maker, he is liable. Elgin Natl. Bank v. Goeckle, 295 Ill. 403. The argument as to granting extensions is untenable.

The judgment will be reversed and judgment entered here in favor of the plaintiff and against the defendant at the sum of $139.75, with interest thereon at 5 per centum per annum from June 26, 1934, to date.

JUDGMENT REVERSED AND JUDGMENT HERE.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

(.4756a) 2M 2-4-23

ple of the State of Illinois, defendant in error, v. T.G.Greer,
se called T.G.Geer, plaintiff in error. Gen.No.29,958.

People ex rel. State of Illinois, defendant in error, v.
Zuckowski, plaintiff in error. Gen. No. 29[illegible]
etc.

239 I.A. 657

Cases with
4757-4760a

Criminal
~~Municipal Court of Chicago;~~
~~Superior~~ Court of Cook county;
the Circuit Court of county;
County Court of county;
ickham Scanlan Judge, presiding. Heard
Branch Appellate Court at the March term, 1925.
this court
remanded with directions.

October 28,1925.

Rehearing denied

~~for appellants.~~
for plaintiffs in error.
~~for appellees.~~
for defendants in error.

delivered the opinion of the court.

TICE

24958

137 - 22038

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error,

v.

E. G. Greer, otherwise called,
E. C. GREER,
Plaintiff in Error,

239 I.A. 657

ERROR TO
CRIMINAL COURT
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 8, 1924, on motion of the defendant, E. C. Greer, this cause was consolidated for hearing with the People of Illinois v. Bischoff, General Number 22037, the records, abstracts and briefs filed and to be filed in that cause, General Number 22037 to be taken and considered in this cause General Number 22038.

We have this day handed down an opinion in People v. Bischoff, General Number 22037. In that opinion we have set forth our reasons in regard to the matters here involved, and adopt that opinion in this case as far as it is pertinent and material.

We are of the opinion that the judgment must be affirmed.

AFFIRMED.

Thomson, P.J. and
O'Connor, J. concur.

E. G. Dress, observing optic.

2M 2-4-25

ple of the State of Illinois, defendant in error, v. Walter Tuskovski,
ff in error. Gen. No. 29,959.

239 I.A. 657

the Criminal
~~Municipal Court of Chicago;~~
~~Superior~~ Court of Cook county;
om the Circuit Court of ~~county;~~
~~County Court of~~ ~~county;~~

Kickham Scanlan, Judge, presiding. Heard
he ~~Branch Appellate Court~~ third division
this court for the first district at the March term, 1925.
an opinion in People v. Burchopp, 238 Ill. App. 359,
and remanded with directions.

led October 28, 1925. ~~Rehearing denied~~

~~for appellants.~~
for plaintiffs in error.
~~for appellees.~~
for defendants in error.

Fagen, Healy & Reid,
E. Crowe, States Attorney, Edward
and Clarence E. Nelson,

G JUSTICE Taylor delivered the opinion of the court.

126 - 29959

239 I.A. 657

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

WALTER TUSKOVSKI,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 8, 1924, on motion of the defendant, Walter Tuskovski, this cause was consolidated for hearing with the People of Illinois v. Bischoff, General Number 29957, the records, abstracts and briefs filed and to be filed in that cause, General Number 29957 to be taken and considered in this cause General Number 29959.

We have this day handed down an opinion in People v. Bischoff, General Number 29957. In that opinion we have set forth our reasons in regard to the matters here involved, and adopt that opinion in this cause as far as it is pertinent and material.

We are of the opinion that the evidence failed to establish the guilt of the defendant Walter Tuskovski.

The judgment, therefore, will be reversed.

REVERSED.

Thomson, P.J. and
O'Connor, J. concur.

2M 2-4-25

ople of the State of Illinois, defendant in error, v. John Borowsai,
iff in error. Gen. No. 29,960.

239 I.A. 657

Criminal

the Municipal Court of Chicago;
~~Superior~~ Court of Cook county;
om the Circuit Court of county;
County Court of county;

Richard Scanlan, Judge, presiding. Heard
he ~~Branch Appellate Court~~ Third division
this court ~~in the first district~~ at the March term, 1925.
~~and remanded with directions.~~ See opinion in People v. Bischoff, 238 Ill. App. 369.

iled October 28, 1925. ~~Rehearing denied~~

Singer, Healy & Reid, ~~for appellants.~~
for plaintiffs in error.
f E. Crowe, State's Attorney, ~~for appellees.~~
nd E. Wilson and Clarence E. Nelson, for defendants in error.

ING JUSTICE Taylor delivered the opinion of the court.

129 - 29960.

239 I.A. 657

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN KARBANSKI,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 2, 1924, on motion of the defendant, John Karbanski, this cause was consolidated for hearing with the People of Illinois v. Bischoff, General Number 29957, the records, abstracts and briefs filed and to be filed in that cause, General Number 29957 to be taken and considered in this cause, General Number 29960.

We have this day handed down an opinion in People v. Bischoff, General Number 29957. In that opinion we have set forth our reasons in regard to the matters here involved, and adopt that opinion in this cause as far as it is pertinent and material.

We are of the opinion that the evidence failed to establish the guilt of the defendant John Karbanski.

The judgment, therefore, will be reversed.

REVERSED.

Thomson, P.J. and
O'Connor, J. concur.

C

2M 2-4-25

People of the State of Illinois, defendant in error, v. Frank Dalkus, ntiff in error. Gen. No. 29,961.

230 I.A. 657

the Criminal
Municipal Court of Chicago;
~~Superior~~ Court of Cook county;
rom the Circuit Court of county;
County Court of county;

Pickham Scanlan, Judge, presiding. Heard

the Branch Appellate Court third division
y this court for the first district at the March term, 1925.
on opinion in People v Bischoff, 238 Ill. App. 369.
and remanded with directions.

iled October 28, 1925. Rehearing denied

inger, Healy & Reid, for appellants.
E. Crowe, State's Attorney, Edward for plaintiffs in error.
~~for appellees.~~
on and Clarence E. Nelson, for defendants in error.

NG JUSTICE Taylor delivered the opinion of the court.

130 - 29961.

239 I.A. 657

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

FRANK DALKUS,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 8, 1924, on motion of the defendant, Frank Dalkus, this cause was consolidated for hearing with the People of Illinois v. Bischoff, General Number 29957, the records, abstracts and briefs filed and to be filed in cause General Number 29957 to be taken and considered in this cause General Number 29961.

We have this day handed down an opinion in People v. Bischoff, General Number 29957. In that opinion we have set forth our reasons in regard to the matters here involved, and adopt that opinion in this cause as far as it is pertinent and material.

We are of the opinion that the evidence failed to establish the guilt of the defendant Frank Dalkus.

The judgment, therefore, will be reversed.

REVERSED.

Thomson, P.J. and
O'Connor, J. concur.

813.14.687

2M 2-4-25

eople of the State of Illinois, defendant in error, v. Frank Chaput, tiff in error. Gen. No. 29,967.

239 I.A. 657

the Criminal
Municipal ~~Court~~ of Chicago;
~~Superior~~ Court of Cook county;
om the ~~Circuit Court of~~ county;
~~County Court of~~ ~~county~~;
Rickham Scanlan, Judge, presiding. Heard
he Branch Appellate Court third Division
of this court for the first district at the March term, 1925.
and remanded with directions. on opinion in People v. Bischof, 238 Ill. App. 369.

led October 28, 1925. ~~Rehearing denied~~

nger, Healy & Reid, ~~for appellants.~~
E. Crowe, State's Attorney, Edward for plaintiffs in error.
on and Clarence E. Nelson, ~~for appellees.~~ for defendants in error.

ES JUSTICE Taylor delivered the opinion of the court.

133 - - 29967

239 I.A. 657

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

FRANK SHAPUT,
Plaintiff in Error.

WRIT OF ERROR
TO CRIMINAL COURT
COOK COUNTY.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 3, 1924, on motion of the defendant Frank Shaput, this cause was consolidated for hearing with the People of Illinois v. Bischoff, General Number 29957, the records, abstracts and briefs filed and to be filed in cause General Number 29957 to be taken and considered in this cause against Frank Shaput, bearing General Number 29967.

We have this day handed down an opinion in the case of the People v. Bischoff, General Number 29957. In that opinion we have set forth our reasons in regard to the matters involved in the instant case, and adopted that opinion in this cause as far as it is pertinent and material.

We are of the opinion that the evidence failed to establish the guilt of the defendant Frank Shaput.

The judgment, therefore, will be reversed.

REVERSED.

THOMSON, P. J. AND O'CONNOR, J. CONCUR.

153 - 29099

RACHAEL WOLF,
Plaintiff in Error,

v.

A. COOPER AND TILLIE COOPER,
Defendant in Error.

239 I.A. 657

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On February 23, 1923, the plaintiff, Rachael Wolf, brought suit in the Municipal Court and recovered a judgment by confession in the sum of $815.00 and costs against the defendants, A. and Tillie Cooper.

On March 1, 1923, an execution was issued, and on March 12, 1923, returned showing a demand had been made on the defendant, A. Cooper.

On March 20, 1923, Fritzker & Fritzker, served notice that they would move to vacate the judgment. With the notice they filed an affidavit of merits made by Tillie Cooper. The affidavit of merits alleged that she was served with an execution issued upon the judgment which was entered on the note; that she did not execute the note set up in the statement of claim, nor sign nor deliver any note to any one; that she did not at any time receive any consideration for the execution of any note; that she did not at any time authorize any one to sign, execute or deliver any note for her for $500.00, dated February 1, 1915, or of any other

date; that she was not indebted to the plaintiff on any note or for any sum whatever.

On March 21, 1923, an order was entered opening up the judgment, and giving the defendants leave to defend. It was provided in the order that the judgment should stand as security and that the affidavit filed should be considered as an affidavit of merits.

On March 21, 1923, demand for a trial by jury was made. A trial was had, and on September 30, 1924, a jury returned a verdict finding that at the time of the rendition of the judgment by confession, there was due from the defendants, A. Cooper and Tillie Cooper, to the plaintiff the sum of $815.00. On that verdict, judgment was entered that the judgment by confession stand confirmed as of its date.

On November 13, 1924, a demand was made on the execution by delivering a copy of the execution to Pauline Cooper, the daughter of A. Cooper, a person over ten years of age, at A. Cooper's residence. On November 29, 1924, the execution was returned, no property found.

On November 29, 1924 a motion was made that the judgment be vacated and set aside and on the same day an order was accordingly entered opening up the judgment and giving the "defendant" leave to make a defense; and providing that the execution be stayed and that the affidavit stand as an affidavit of merits. To that order the plaintiff took exception.

The affidavit of A. Cooper alleged that he had

theretofore been informed that the suit of Rachael Wolf v. myself and Tillie Cooper had been dismissed and the matter disposed of and he learns at this time that there is a judgment against him and against the said Tillie Cooper; that he has paid said note in full many years ago and that the plaintiff has from time to time admitted to defendant that she had no claim of any kind, nature or description, but that she held the note for the purpose of compelling the other defendant in this cause, Tillie Cooper, to abandon certain claims she had against plaintiff, and for no other reason whatsoever; that he has from time to time demanded the return of the note but that plaintiff has always refused to return the same; that Tillie Cooper is not jointly liable with affiant; that she did not execute, sign nor deliver said note at any time; that she did not receive any consideration therefor."

On December 17, 1924, pursuant to a notice and affidavit an order was entered re-establishing in the records of the case the contents of the note sued upon, and which note had been lost or abstracted from the files.

This is a writ of error sued out by the plaintiff. The error complained of is that the court erred in entering the order of November 28, 1924, opening up the judgment.

The chief question in the case arises upon the affidavit of the defendant, A. Cooper, of November 28,1924. The original judgment by confession was entered on February 23, 1923. On March 21, 1923, on an affidavit of Tillie Cooper, one of the defendants, it was opened up. On September 30, 1924, there was a jury trial, and verdict and

judgment for the plaintiff. On November 13, 1924, an execution was legally served on A. Cooper. And five days later, nearly two years after the confession, and over a year after the judgment was first opened up, and nearly two months after a trial, verdict and judgment, the judgment was again opened up on the affidavit of the other defendant, A. Cooper. As a matter of reason and common sense, it does not seem necessary in deciding this case to do more than merely recite the history of the proceedings. There is nothing in the affidavit of the defendant A. Cooper that justified opening up the judgment after a jury trial and verdict. His allegation that he had been informed that the suit had been dismissed is not, as it is made, sufficient. It is not alleged where or of whom he got the information. Nor is it sufficient to allege that he had just learned that a judgment stood against him. He does not deny legal service of the execution. His allegation that he had paid the note merely disputes the obligation on which the judgment was entered. The allegation that the plaintiff had from time to time admitted that she had no claim is merely a traverse of the plaintiff's statement of claim. On the whole the allegations of the affidavit show, in no way, any substantial reason why the work of the court and jury should be undone. Further, it is reasonable to infer from the record that, on March 12, 1923, the day when a demand on the execution was first made on him, he knew that a judgment had been entered against him. It is, also, reasonable to infer that on March 31, 1923, when the petition of Tillie Cooper was presented, he

knew about it, especially as the attorney who acted in the matter purported to act as "attorneys for defendants." As, therefore, the petition here involved was not presented until the lapse of nearly two years after the judgment by confession was entered, and over eight weeks after the judgment had been confirmed, it is obvious that, in the eyes of the law, he must be considered as guilty of unjustifiable negligence. Imbris, et al v. Bear, 230 Ill. App. 155. It follows that the order of November 29, 1924, was erroneous. The point is made that the order entered is not a final order. That, however, is not argued and, under the rules, must be considered as waived. The order, therefore, will be reversed, and the cause remanded with directions to dismiss the petition of the defendant, A. Cooper, thus reinstating the judgment of September 30, 1924.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

389 - 30263

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MORTON GREENE,
Plaintiff in Error.

239 I.A. 657

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 28, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On April 10, 1924, an information was filed in the Municipal Court against Mort Greene, the defendant, charging that on April 1, 1924, in the City of Chicago he "did then and there receive, hire, employ, use and exhibit as singers and dancers, Ruth Weiss and Sylvia Weiss and Ethel Page, minors under 15 years of age to-wit:- ages of four, six and twelve years respectively, in violation of Sec. 42 B Par. 88 ch. 38 R.S., contrary to the form of the Statute in such case made and provided."

In answer to the information the defendant appeared in person, and by counsel, and pleaded not guilty. The defendant having filed a jury waiver, there was a trial before the court, without a jury, and the defendant, being found guilty as charged in the information, was sentenced to pay a fine of $100.00 and costs. To reverse that judgment, the defendant sued out a writ of error in the Supreme Court. That court being of the opinion that it did not have jurisdiction, transferred the case to this court.

Opinion filed Oct. 28, 1938.

The only point made in the brief of counsel for the defendant, that we are entitled to consider here, is whether the informationcharged a crime. It is argued that, as the Act makes it "unlawful for any person having the care, custody or control of any child under fourteen years, to exhibit," etc., that the recitiation in the information that the defendant used and exhibited, "as singers and dancers Ruth Weiss and Sylvia Weiss and Ethel Page, minors under 15 years of age, to-wit; ages, four, six and twelve years respectively," is defective and does not charge a crime. As the information gives the ages of the three children, and each is shown to be under fourteen, it comes expressly within the scope of the Act, and is not subject to the objection made.

It is also urged for the defendant that after the sentence of guilty of violation of the Child Labor Act, a motion to vacate was made in behalf of the defendant, and continued from time to time until April 25, 1934, and that at that time the State's Attorney obtained leave to amend the complaint, and made the amendment "by physically interlining the figures 2 a and 83 and substituting the figures 42b and 88 therefor." The record before us does not show, however, that any such amendment was made.

The judgment will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

342 - 29759

KNIGHTS OF THE KLU KLUX KLAN,
Appellee,

v.

EDGAR F. BRADFORD,
Appellant.

239 I.A. 658

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 29, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of replevin against the defendant to recover possession of liberty bonds of the par value of $1,000.00. The writ was served on the defendant but the bonds were not obtained and plaintiff, by leave of court, filed a statement of claim in trover, wherein it was alleged that on the 25th of March, 1924, plaintiff was lawfully possessed of the bonds; that they were lost and came into the possession of the defendant by finding and that the bonds were held by the defendant as treasurer of one of plaintiff's subordinate branches. The defendant filed an affidavit of merits wherein he denied that he was holding the bonds and denied that on the 25th of March or any other date, plaintiff was lawfully possessed of the bonds but averred that the bonds belonged to branch No. 2 and not to plaintiff, and that they were turned over, by him under regular orders and vouchers issued by proper officers of branch No. 2 to the Oak Haven Old Peoples Home. The case was tried before the court without a jury and a

Opinion filed Oct. 29, 1935.

finding that the defendant was guilty of "maliciously, wilfully and intentionally and with intent to injure and defraud the plaintiff, converted to defendants own use the property ofplaintiff as alleged in plaintiff's statement of claim and assesses the plaintiff's damages at the sum of One Thousand Dollars ($1,000.00)." Judgment was entered on the finding and the defendant appeals. No brief has been filed on behalf of the plaintiff.

The defendant contends that the judgment is wrong and should be reversed because plaintiff could not sue in the courts of this state for the reason that it was a foreign corporation and had not complied with the laws of this state by obtaining a license to do business in this state. No such defense was set up in the defendant's affidavit of merits and although there was some contention made on the trial by the defendant to the effect that plaintiff was a foreign corporation and not authorized to do business in this state, and, therefore, could not sue in the courts of this state, we will notpass on this contention.

The record discloses that some difficulties arose between the officers and members of local branch No. 2 of which the defendant was treasurer and one Palmer who appears to have been the head officer of plaintiff in this state, and on the 19th of March, 1924, at a regular meeting of branch No. 2, a resolution was passed to the effect that if any steps were taken to cancel its charter, the bonds in question should be given to the Oak Haven Old Peoples Home, and the resolution as shown by the minutes further provided that the bonds be delivered to three trustees of branch No. 2 of

which the defendant was one, for the purpose of delivering them to the Old Peoples Home. On March 26th at another meeting of branch No. 3, a resolution was passed that the three trustees above referred to be ordered to carry out immediately the directions given them on the 19th of March. And on the 27th of March the bonds were delivered by the defendant as one of the trustees to the Oak Haven Old Peoples Home and he took a receipt for them on the same day. March 27th, Palmer issued what purports to be an order that the charter of branch No. 3 be cancelled, but whether it was before or after the delivery of the bonds to the Old Peoples Home, does not appear. The next day, March 28th, notice of such alleged cancellation was given to one of the officers of branch No. 3, although it was not brought to the attention of the defendant officially in any way until, as he testified, on the trial of the case, which was commenced on the 4th of August, 1924.

Plaintiff's position was and is, that under its constitution, upon the cancellation or revocation of the charter of any branch of the order, all of such branch's property automatically becomes the property of plaintiff, and that since, in the instant case, branch No. 3 charter was cancelled by the action of Palmer, the bonds in question become plaintiff's property. Plaintiff's further position seems to be that, since the bonds were last in the possession of the defendant, he is personally liable for the value of them. Over the objection of the defendant, Palmer was permitted to testify that, by virtue of authority given him by plaintiff, under power of attorney, he cancelled the charter of branch No. 3. No such power of attorney is shown

in the record and it is elementary that Palmer could not prove his agency by his own testimony. Elevator Safety Device Co. v. Iron Works, 153 Ill. App. 314; Mullanphy Savings Bank v. Schott, 135 Ill. 665; Fleishman & Co. v. Mallon, 131 Ill. App. 565. And since there was no proper proof of Palmer's authority, his action in attempting to cancel the charter of branch No. 2 fails for lack of evidence, even if we should hold that, under plaintiff's constitution, such cancellation might properly be made, a question which we do not here decide.

Since the record before us discloses that the defendant had turned over the bonds to the Old Peoples Home on the 27th of March, 1924, pursuant to the directions given him by Branch No. 2 and he was, therefore, simply carrying out the orders and directions given, and since the evidence shows that he was not notified of the alleged cancellation of the charter before turning over the bonds, and since the action of replevin was not brought until the day following the turning over of the bonds, viz. March 28th, the defendant is not now liable.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

30351

239 I.A. 658

C. W. HEATH,

Appellee,

v.

CITY OF CHICAGO, et al,

Appellants.

APPEAL FROM

INTERLOCUTORY ORDER OF INJUNCTION,

CIRCUIT COURT.

Opinion filed November 4, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal by the defendants from an interlocutory order awarding plaintiff a temporary injunction restraining the defendants from interfering with the complainant in his work of repairing or remodeling his house. The matter was heard upon complainant's verified bill, the defendants' verified answer and an affidavit read by the defendant in support of the answer. Complainant has filed no brief in this court.

The material allegations of the bill are that plaintiff was the owner of a story and a half residence in Chicago where he had lived a number of years; that a few months prior to the filing of the bill he had arranged with a building contractor "to add a porch roof to the upper story" and had proceeded with the work up to July 31st, 1925, at which time the work was nearly completed; that on that date he was served with a notice by the Building Department of the city, advising him to stop work until plans were submitted to the building depart-

Opinion filed November 4, 1982.

ment and a permit obtained. It further alleged that the porch which complainant was having roofed had been on the building since its original construction and that to complainant's best knowledge and belief no permit was required in reference to the roof; that he had expended $500.00 in the construction of the improvements and that the completion of them would require another $500.00. It was further alleged that complainant on two different occasions went to the Building Commissioner with plans for the purpose of obtaining a permit; that the permit was refused by a deputy building commissioner, who refused to give any reason for such refusal; that the deputy commissioner resided across the street from the building in question and that the re-construction did not please him; that complainant was informed and believes that the reconstruction required no permit; that the roof which was being put on the porch was not a fire menace, nor did it violate any of the fire regulations or the building ordinances; that it was sound in construction and proper material was used, and that it was being done in a workmanlike manner.

The defendants in their answer, which was verified, set up the provisions of certain ordinances which were in force and effect at the time in question. These ordinances require that before proceeding with the "erection, enlargement, alteration, repair or removal" of any building in the city, a permit for such work should first be obtained by the owner of the building from the Commissioner of Buildings, and that it should be unlawful to proceed with any of such work unless such permit should first be obtained; that application for such permit should be made by the owner, to the Commissioner of Buildings, accompanied

by plans showing the work to be done, which should be examined and if found proper, the commissioner should issue a permit. The answer admitted that within the last few months the complainant had arranged with a building contractor to add a roof to the porch of the upper story of his residence and had proceeded with the work until January 21st, when complainant was served with a notice by the officials of the defendant, requiring him to stop all work. It further set up that the complainant had not at any time applied for a permit accompanied by plans showing no violation of the city ordinances. The answer denied that complainant on two different occasions presented himself at the Building Commissioner's office with plans for the purpose of obtaining a permit and denied that the application was refused by the deputy building commissioner. It further denied that complainant had complied with all the ordinances of the city and denied that it had arbitrarily refused to permit him to proceed with the work. It further averred that the complainant had a complete remedy at law by way of mandamus. Accompanying the answer was an affidavit of the deputy building commissioner mentioned in the bill, in which he swore that at no time was there presented an application in regular form, accompanied by plans which were in compliance with the city ordinances.

From the answer of the defendants, it clearly appears that before plaintiff could proceed with the work in question, he was requiredto apply for and obtain a permit. He did not obtain the permit, and if the city officials acted arbitrarily in the matter, his remedy was by mandamus. There is no contention that the ordinances above referred to are invalid. And since

the ordinance provided that a permit must first be obtained, equity had no jurisdiction, because complainant had a complete remedy at law by instituting mandamus proceedings.

The order appealed from is reversed.

ORDER REVERSED.

THOMSON, P.J. AND THOMSON, J. CONCUR.

507 - 30398

239 I.A. 658

A. A. WORSLEY and WILLIAM J. ROACH, conservators of the person and estate of EMMA SWIGART, an insane person,

Appellants,

v.

ENA WELCH,

Appellee,

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

In re Petition of Ena Welch, in Estate of Charles F. Swigart, deceased, to set aside Finding of Heirship.

Originally filed Oct. 28, 1925.
Refiled November 12, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The question presented on this appeal is one of fact, - namely, whether the finding of the Circuit Court, that the petitioner, Ena Welch, was the daughter of the deceased, Charles F. Swigart, is against the manifest weight of the evidence, as contended by the respondent conservators, who have perfected this appeal from that finding and from the judgment of the Circuit Court entered pursuant thereto.

Charles F. Swigart died October 17, 1917, leaving a large estate. The public administrator was duly appointed administrator of the estate. On October 22, 1917, proof of heirship was made, showing Emma Swigart, the insane sister

of the deceased, to be his sole heir. The following year, namely, in August, 1918, Ena Welch filed her claim against the estate for $10,000.00, which she stated was due her for services "consisting of household work, clerical work and generally looking after the deceased," for which he had promised to compensate her. Henry B. Welch, the brother-in-law of Ena Welch, who made the affidavit in connection with this claim, as her agent, made the statement therein that "she has no other claim against said estate." Over four years after the filing of this claim for services, namely, in December, 1922, Ena Welch filed her petition alleging that she had been born on February 4, 1869, at Chicago; that she was the lawful daughter of the deceased, Charles F. Swigart, as the result of a common law marriage between the said Swigart "and her mother, Sarah Swigart," which was consummated "on or about the month of March, 1868, at Chicago, Illinois." She alleged further in her petition that her mother lived with the deceased until she died in 1895; and that she had been informed that sometime between 1888 and 1892, a ceremonial marriage was consummated between them. By herpetition, she asked that the finding as to heirship in the Estate of Charles F. Swigart be set aside and that she be declared to be his daughter and sole heir.

After an extended hearing in the Probate Court on this petition Ena Welch was found to be the daughter of one Davis and not the daughter of the deceased, Swigart, and her petition was dismissed. She perfected an appeal to the Circuit Court where there was a trial de novo, at the conclusion of which the finding of the Probate Court was set aside and Ena Welch was declared to be the daughter

and heir of Swigart, as set forth in her petition. The present appeal, from that order, was taken to the Supreme Court of Illinois. That court transferred the appeal to this court.

The mother of the petitioner was a woman whose maiden name was Sarah Saunders. We shall refer to the petitioner as Ena, and her mother as Sarah. The home of the latter was in the village of Cape Vincent in northern New York, to which she had been brought by her parents from their former home in England. Sarah had two brothers, Joseph, who died about 1912, and Alfred who was a witness in this case.

Wolfe Island, about twenty-two miles long and seven miles wide, is the largest one of the Thousand Islands in the St. Lawrence River and is about a mile from Cape Vincent. It is Canadian territory. On the upper side of the river at that point, there is located the town of Kingston, in the province of Ontario. In 1865, the Davis family were among the old residents of the island. The member of that family, immediately involved in this case, was Thomas James Davis. The evidence shows that he was well known throughout that community as "Tom Jim," and that he was a man who was generally popular with everybody. His chief accomplishment was as a clog dancer. Tom Jim's parents were known as Uncle Bill Davis and Aunt Sally Davis. The former was famous as a trout fisher. They kept a tavern on Wolfe Island which was a place frequently resorted to by the people of the community. It was known as "Aunt Sally's." Beside the tavern accommodations it afforded, it included

a store at which the children who attended a near-by school made their purchases, and also a dance hall where the young people of the Island frequently congregated. Tom Jim had two brothers, William and Richard, - both now deceased. William had three daughters, whose names are Mary Stevenson, Ellen Hedderson and Sarah Kitchen, all of whom testified in this case. Richard had a son, James, now a resident of Chicago, who was also a witness. All these witnesses testified for respondents.

Sometime in 1865, Tom Jim Davis and Sarah Saunders were married. That fact is established, not only by the testimony of many witnesses who appeared in this case in behalf of the respondents, but also by that of a number who testified for the petitioner. In December of that year, Tom Jim engaged in a fight with one Warren, in a Cape Vincent saloon, and was stabbed to death. The body was brought home to Wolfe Island and was laid out on the floor of the dance hall at Aunt Sally's.

It is the claim of the respondents that sometime during the first half of the year, 1866, the petitioner Ena was born at Aunt Sally's, to Tom Jim's widow, Sarah, and that Tom Jim was her father, and that, at Aunt Sally's request, she was named after Tom Jim, being christened James Ena Davis, at the school house near by. For some time after Tom Jim's death Sarah continued to live at Aunt Sally's and at one time she engaged in the millinery business at Marysville, a small settlement on Wolfe Island a few miles from Aunt Sally's. Uncle Bill Davis died in 1870 and the following year Aunt Sally sold her Wolfe Island

property and moved to a town in Ontario called Craighurst, where her niece Mary Stevenson now lives.

It is the further contention of the respondents that in 1872 or 1873, Sarah came to Chicago with her child, Ena. Not long after her arrival here she met the deceased, Swigart, and they soon began living together, and they continued to do so until Sarah died, in 1895. Ena grew up in that household in Chicago. In 1887 she was married to a man named James A. Welch, who died a few years later. He had a brother, Henry B. Welch, who acted as Ena's agent in filing her claim for services against Swigart's estate. After the death of her husband, Ena left Chicago and went on the stage. When her mother died, Swigart tried to induce Ena to return to his home and keep house for him, but she declined. In 1901, Swigart married a woman named Louise Haas. She died in 1916. Again Swigart tried to get Ena to come to Chicago and make her home with him, and again she refused to do so. A year later Swigart died.

On the other hand, it is the claim of the petitioner that her mother Sarah, having engaged in the millinery business in Marysville, for about a year after Tom Jim's death, returned to live with her mother at Cape Vincent, and remained there until the early fall of 1867, when, in company with a friend, she came to Chicago, having no child born to her as the result of her marriage with Tom Jim Davis. Petitioner contends further that her mother and Swigart began living together in the spring or summer of 1868 and that she was born of that union, at Chicago, on February 4, 1869. Thus is presented the issue of fact, - Was Ena a member of the family of Swigart, the

deceased, or was she a member of the Davis family? The Circuit Court found that Swigart and Sarah entered into "a legal and binding contract of marriage under the common law, in the year 1868 * * * and that as a result of said marriage and said co-habitation, there was born to said Charles F. and Sarah Swigart, a child, the petitioner herein, Ena Swigart Welch." It is the contention of the respondents that both the finding as to the common law marriage, and the finding as to paternity, are against themanifest weight of the evidence.

Before turning to those main issues presented on this appeal, we shall refer to the third assignment of error relied upon by the respondents and also an assignment of cross-error assigned by petitioner, in both of which the respective parties contend that the trial court erred in ruling on the admission of evidence. There are a number of rulings of this nature, complained of by respondents. In our opinion, the trial court erred in all of them, with, possibly, a few exceptions. Many questions were put to the petitioner on cross-examination by counsel for the respondents which were ruled out by the court on objection of counsel for the petitioner. In almost every instance they were entirely proper in our opinion, and the objections to them should have been overruled. While the subjects referred to in some of those questions had not been specifically covered in the questions put to the petitioner on direct examination, they had materially to do with the subjects that were involved on such direct examination. They went, directly in some instances and indirectly in others, to the very heart of the question

of whether the answers made by petitioner in the course of her direct examination, were true and correct or whether they were not. Our Supreme Court pointed out in Felsenthal Co. v. Northern Assurance Co., 294 Ill. 343, that "the cross-examination of a party in interest need not be confined to the subject-matter of the examination in chief." Again the same court said in Hanchett v. Kimbark, 118 Ill. 131, that "more latitude is always allowed in cross-examination where the witness is one of the parties in interest * * * than in the case of an ordinary witness, and we think it safe to say that a Circuit Court may, in its discretion, where a party in interest is a witness, allow the cross-examination to take a wider range." In this manner, counsel for respondents were improperly and very materially restricted in their cross-examination of the petitioner. The same thing was true in the case of several other witnesses who testified for the petitioner. We shall refer to the other errors in the matter of admission of evidence, urged by respondents, when we have occasion, later in this opinion, to discuss the particular evidence involved.

In support of her assignment of cross-error, petitioner contends that the trial court erred in admitting so-called pedigree evidence, to the effect that Ena was a member of the Davis family. This consisted of testimony of witnesses, to the effect that they had heard the mother of Tom Jim Davis, Aunt Sally, his two brothers, William and Richard and the brother of Sarah, Joseph Saunders, say that Ena was the daughter of Tom Jim Davis, or call her such. All the declarants thus referred to were deceased at the time the testimony was given

and they were all connected, by birth or marriage, with the Davis family. In our opinion, the evidence was proper and the trial court did not err in admitting it. The crux of the argument of counsel for the petitioner on this point is to be found in the contention made in their brief, that "petitioner's pedigree is not involved nor is the pedigree of the Davis family involved, but merely the pedigree of Charles F. Swigart, the deceased." In that contention counsel are in error, in our opinion. The question is, whether Ena is a member of the Swigart family, - the daughter of the deceased and his heir. Petitioner contends that she is. In support of that contention, she introduced pedigree evidence of the Swigart family, - evidence of declarations of deceased members of that family, tending to show she belonged to that family. That evidence was proper. As a part of their proof that petitioner did not belong to the Swigart family, respondents offered evidence to the effect that she did belong to another family, namely, the Davis family. In that connection, it was proper to introduce pedigree evidence of the Davis family. Respondents were not limited to negative evidence in their proof. They were not obliged to submit evidence merely to the effect that Ena was not a member of the Swigart family. They might properly prove that in effect, by showing, if they could, that she was really the member of some other family, and in that connection submit pedigree evidence tending to show her connection with that family. Counsel for petitioner contend that the finding of the trial court to the effect that Ena was a member of the Swigart family, rendered incompetent the pedigree evidence as to the Davis family. Such a contention is not

tenable. Similarly, if the finding of the Circuit Court had been that Ena belonged to the Davis family, that finding would not have had any effect on the question of the admissibility of the pedigree evidence as to the Swigart family, submitted by the petitionef. Declarations of deceased members of the Davis family to the effect that petitioner was not a member of the Swigart family would not be admissible, but declarations to the effect that she was a member of the Davis family were admissible. "Before declarations of persons can be admitted to prove pedigree, it must be established that the declarant is dead, that the declarations were made before the controversy arose, and that the declarant was related by blood or marriage to the family to which the declarations refer." 9 Enc. of Ev. 739; Jarcow v. Crosse, 257 Ill. 36. The question of whether the pedigree of that family is material to the issue involved, is a separate question entirely, and it has nothing to do with the pedigree rule. We shall not analyze here, the many cases cited by counsel for petitioner in support of their contention on this point. In our opinion, those of them which are applicable to the situation presented here, do not support the contention made, but most of them are not applicable to the case at bar. Of course, where the question at issue is whether a given person belongs to a given line of descent and is entitled to inherit certain property, evidence submitted as pedigree evidence, consisting of declarations referring to that family, either being that such person is or is not in that line of descent, or does or does not belong to that family, will not be admissible unless the declarants are shown to have been de-

lated by blood or marriage to that family. But the declarations involved in the evidence objected to by petitioner had no reference whatever to the Swigart family but to the Davis family. The pedigree of that family was involved. It came to be so, necessarily, when the respondents advanced the contention that Ena belonged to that family and that, such being the case, she could not be a member of the Swigart family. Counsel for petitioner make the further contention that the pedigree rule, is a rule of necessity and that there was no such necessity in this case because respondents claimed to have direct proof of the fact concerning which they offered pedigree evidence, namely, that Ena was the daughter of Tom Jim Davis and his wife Sarah. Pedigree evidence is not excluded because the party offering it has direct proof of the fact at issue. Jarcow v. Grosse, supra. The "necessity" which makes the exception to the hearsay rule and renders pedigree evidence admissible, is not born of the fact that no other evidence is available, but rather that the declarants of the statements testified to are deceased, and therefore cannot, themselves, be brought in to testify.

The sworn petition filed in this case alleged a common law marriage between Swigart and Sarah Davis in 1866 or thereabouts and the trial court found that there was such a marriage. In our opinion, that finding is clearly against the manifest weight of the evidence. After Sarah came to Chicago and became acquainted with Swigart, they began living together and continued to do so until she died. The mere fact that they cohabited throughout that period does not

establish a common law marriage, in or about 1868, or at any other time. Before 1905, a common law marriage could be contracted legally, in Illinois. But in order to consummate such a marriage it was "not sufficient to agree to present cohabitation and a future regular marriage when more convenient, or when a wife dies or when a ceremony can be performed." Cartwright v. McKown, 131 Ill. 388. In the same case, our Supreme Court, quoting from Van Tuyl v. Van Tuyl 57 Barb. 237, pointed out with reference to a common law marriage, that such a marriage would be established "by proof of an actual entract, per verba de presenti, between persons of opposite sexes, capable of contracting, to take each other for husband and wife, especially where the contract is followed by cohabitation." A contract of common law marriage required a meeting of minds and a mutual assent by the parties thereto, clearly expressed. In McKenna v. McKenna, 73 Ill. App. 64, this court (~~XXXXXXXX~~) said, "if parties wish to disregard the wise and wholesome regulations of the community as to forms and ceremony of marriage, they have the right do to do and to make their marriage a matter of simple civil contract only; but in attempting so to do they must see to it that such proof of the transactions is preserved as will enable courts to discover a valid marriage contract, viz., a definite agreement on the part of each, followed by an assumption of the marriage status." In our opinion the evidence in the record fails to show any such "definite agreement on the part of each." Certain witnesses testified to hearing Swigart refer to Sarah as his wife or introduce her as such, and that upon her death he buried her as his wife and on certain occasions thereafter

referred to himself as a "widower" in deeds he executed. Beyond that, all the evidence in the record on the subject, tends to show these parties never contracted a common law marriage. Such is the effect of the testimony of a number of petitioner's own witnesses. Sarah's own brother Alfred, who testified for petitioner, said he visited Chicago in 1881 and again in 1892 and on both occasions he heard that his sister was not married to Swigart, although they were living together; that he asked them about it but they said they were married.

Swigart became a candidate for Alderman about 1892. Those interested in his candidacy talked with him about his living with a woman who was not his wife, and they said he would have to marry her or be defeated. He became very angry at this and said it was nobody's business. The evidence shows, however, that his friends kept pressing him in this matter, till one day he told them he and Sarah "had gone and done it," - that they had been married. Beyond that there is no proof that they were. One witness says he produced a "paper" at that time, which he showed to some of his friends but what it was is not shown. It satisfied his friends and apparently quieted the rumors, for he was elected. Russell, a witness for petitioner, testified that he heard one of Swigart's political supporters say to him, in connection with this matter, "You know you are not married," and that Swigart replied that he didn't see that it was any of their business, - that he had been "living with the woman for years," and had a daughter. Another witness for the petitioner, Joadwine, testified that he took this subject up with Swigart at this time and told

him that his opponents were going to defeat him, "on that ground, that you are living with a woman without being married to her," and that Swigart replied by saying he wanted to be elected and asked Joadwine what the latter thought he had better do and he told him to "go out and marry this woman and legalize her as your wife," and Swigart said he would, and that following this the "gone and done it" incident took place. Another witness for petitioner, who referred to the aldermanic campaign, was Corlett. He testified that when this matter was taken up with Swigart, "he said he wasn't married to her but he intended to be married to her." The whole attitude of Swigart, in connection with the subject of his status, so far as Sarah was concerned, at the time of his aldermanic campaign, was, on the testimony of petitioner's own witnesses, entirely inconsistent with any claim that they had previously entered into a common law marriage contract.

Another witness for petitioner, Mrs. Meyers, testified that Swigart's wife, Louise, whose friend the witness was, told her that Swigart had formerly lived with a woman for twenty years and that she (Louise) did not approve of it. One Viers, another of petitioner's witnesses, testified, on cross-examination that he had heard Swigart say he was not married. This was at the time he was living with Sarah. This witness testified that because of the fact "that there was some question about this marriage" he urged him to make a will.

Turning now to witnesses who testified for respondents and whose testimony covered this subject of whether any marriage existed between Swigart and Sarah, Kinney testi-

fied that he had heard Swigart boast that he was not married to anybody, - that he did not "want any wife tagging me around." He was asked if he ever heard Sarah say whether or not she was married to Swigart, and he answered, "I heard her say a dozen times that she was not." O'Dell testified that in 1901, some years after Sarah had died, Swigart told her he "was contemplating marriage;" that he said, "You know, I was not married to my former wife, she was my common law wife." One Hunt gave testimony similar to the witness last referred to. This witness was a next door neighbor of Swigart after he had married Louise and was living with her. He testified that Swigart told him that "he was married to her (Louise) but that he never married the other." Dr. Buchan (Emma Swigart's physician) testified that along in the 80's, Swigart told him that Sarah was his housekeeper. This witness testified that it was "generally understood he wasn't married. He never told me he was married." Walsh testified he had known Swigart since he (the witness) was a boy and that for some time he lived directly across the street from Swigart and attended the same school Ena did and that he knew Ena's mother as "Mrs. Davis;" that he knew her by that name for a number of years, -"from the time I was a little boy up until I was maybe twenty or twenty-five, I never knew her in any other way than as Mrs. Davis." The witness McLean testified that he was a neighbor of Swigart's for twenty years, living next door to him, and that Swigart told him the name of the woman he was living with was "Davis".

Another of respondent's witnesses, Mrs. Edwards, testified that she knew Ena as Ena Davis and her mother as

Mrs. Davis and that she never heard her referred to or called "Mrs. Swigart." The sister of Mrs. Edwards, Mrs. Van Cour, testified that for a time Swigart lived in the block where she was born. She gave similar testimony and said, "I knew her as Mrs. Davis in that community, while she resided there." Mrs. Jenkins testified that in 1887 she lived as a near neighbor of Swigart in one of his buildings and that at that time "a lady by the name of Mrs. Davis lived with him * * * Mrs. Davis and I visited back and forth in our respective homes in that building ** * I never knew her by any other name while I lived in that building, or while I knew her, only Mrs. Davis." A Mrs. Barrow gave similar testimony.

One Conroy testified to his acquaintance with Swigart; that on an occasion when the witness was having some words with his wife, Swigart was present, and said he would go, and he did, and the witness went with him, and after they were outside Swigart referred to some of the advantages of not being married, whereupon the witness asked him, "Are you not married?" and that Swigart replied, "No, I am not married. I have got a housekeeper." The next time the witness saw Swigart was at the latter's home, and he testified that on that occasion Swigart "introduced a lady to me and said, 'This is my housekeeper, Mrs. Davis.' * * * I think he called her Sarah or Sally, - something like that." On cross-examination, this witness testified again that Swigart told him he was not married, explaining that "When you are not married, women are more submissive, subservient and obedient, than when you are married," and the

witness further testified, "and he used some funny expression, - he said it was like a street car, when you haven't got it you have to run after it, but when you have got it, you haven't got to run after it."

One McCall testified that he was a neighbor of Swigart for a time and that the woman living with him was Mrs. Davis and that she was keeping house for him. One McGuire testified that he knew Ena's mother as Mrs. Davis and never knew her by any other name. Mrs. Fallon testified to the same effect and Mrs. McWade did likewise.

The petitioner herself testified that when she entered school, she did so under the name of Ena Davis; that she repeatedly heard her mother ask Swigart to marry her; that she said, "You know Ena is our child and I feel terrible about not being married, and having her come into the world like this without a name, without being married;" that she heard talks to this effect between her mother and Swigart several times in her early life; that "My father said he would marry her * * * when he got good and ready." The testimony of witnesses for the petitioner is that Ena was known by the name of Swigart, as a young child, but when she went to school she entered as Ena Davis. The contention is that this was done "to protect the child from being known as illegitimate." On petitioner's theory that Swigart and her mother contracted a common law marriage in 1868, how it was necessary or desirable to change her name from Swigart to Davis when she went to school, is difficult to understand. It would seem that such a procedure

would have the opposite effect, from that contended for. In our opinion, the great preponderance of all the foregoing oral testimony is contrary to any finding that these parties, in 1868, or at any other time, entered into an agreement per verba de presenti to take each other as husband and wife. The most that it establishes is cohabitation, with an agreement for a future marriage, on the part of Swigart, when he "got good and ready." That does not establish a common law marriage. The marriage state could not be imposed upon Swigart against his consent. Nor does the fact that Swigart may have, on occasion, held Sarah out as his wife, make her such. "Declarations of parties to a meretricious cohabitation, when made simply to cover up their shame or immorality, are entitled to no weight, when the question whether or not they have been lawfully married, is to be determined." Eldred v. Eldred, 97 Va. 606. Or, as the court put it, in Bickings Appeal, 2 Brewst. (Pa.) 202, a man "may even, to gratify her (his mistress) allow himself to be held out to her friends and acquaintances as her husband, * * * and yet the evidence falls short of that which ought to satisfy the mind that there was an actual agreement to form the relation of husband and wife."

But we are not obliged to rely merely on oral testimony, on this question of whether Swigart and Sarah entered into an agreement of marriage or consummated a common law marriage in 1868, as alleged by the petitioner and found by the court. There is documentary evidence in the record which is wholly inconsistent with any such status. At different times between 1875 and 1890, Swigart executed deeds to real property he was conveying. There

are twenty-five such deeds in the record, all of which described the grantor as "Charles F. Swigart, a bachelor." The acknowledgments to these deeds were made by him before fifteen different notaries public, who certified that the grantor thus described, was personally known to them and had executed the various deeds involved. Some of these deeds were mortgages of the old form, showing a receiver was named, and in four of them Swigart named "Mrs. Sarah E. Davis" as such receiver.

In addition to these deeds, the respondents offered in evidence, a certified copy of the duly recorded certificate of the death of Sarah, which showed her death as occurring on November 1, 1895, and recited that, she at that time had been living in Illinois 32 years, showing her arrival here five years after 1868, and at a time agreeing and corroborating much other evidence on that point, introduced by respondents. In 1895, the statutes of Illinois required records of deaths to be made in accordance with a uniform form of certificate (Laws of 1877, page 308) Our statutes further provide that a certificate of death shall be admissible as evidence of the facts therein stated. Ill. Sts. ch. 111½, sec. 55. One Moffat was the undertaker in charge of Sarah's funeral. His employee, Arnett, testified that he was present when Swigart gave his directions to Moffat and that Swigart "gave the usual information for family history which is required by law in the certificate;" that "Mr. Moffatt made up the certificate * * * Mr. Moffatt put down all Mr. Swigart told him to in the certificate in my presence, and he signed it there in my presence. That certificate is filed with the Health Department, Bureau of Vital Statistics." The witness identified the signature of

Moffatt on the original certificate. The offer of this document was rejected. Inour opinion, it was competent and material and should have been admitted.

As already stated, we are of the opinion that the finding that Swigart and Sarah entered into a common law marriage at Chicago, in 1868 as alleged by the petitioner, is clearly against the manifest weight of the evidence.

But the other issue of fact presented for our decision is the more important. It would not alter our decision of this case, even though we reached the conclusion that there had been a common law marriage of these parties, as found by the trial court. For even if there had been such a marriage, the petitioner would not be an heir of the deceased and be entitled, as such, to inherit his estate unless Swigart was her father. Any marriage that might have taken place between these parties could not have had the effect of legitimatizing Sarah's daughter, unless she was also the daughter of Swigart. On that issue we are likewise of the opinion that the finding of the Circuit court, to the effect that she was, is clearly against the manifest weight of the evidence, and even to a greater degree than on the issue of marriage.

That Sarah was the mother of Ena is conceded. It is not contended that she ever had any other child. Was Ena born in Chicago in 1869, and was Swigart her father, as she now contends, or was she born on Wolfe Island in Canada in 1866, and was Tom Jim Davis her father,

as the respondents contend? That is the important issue of fact presented in this case.

A number of witnesses, testifying for the petitioner, told of conversations with Swigart, in which he referred to Ena as his daughter. On the other hand, many witnesses for respondents testified that Swigart told them she was his stepdaughter or that they heard him refer to her in that manner. Even one of the witnesses for the petitioner, one Rice, to whom we shall refer in another connection, testified that he had heard Swigart "call her step-daughter in company quite a number of times if he was talking with anybody." One of the respondents' witnesses whose testimony touched this question was Henry R. Baldwin, a lawyer of long practice in Chicago, a brother of a former member of this court. He testified that he knew Swigart, who at one time lived in the same neighborhood as the witness; that he had met him many times and on a number of occasions he and his wife had been to Swigart's home to dinner; and that both Swigart and Sarah had stated that Ena was "Mrs. Davis' daughter." Mrs. Koontz, a sister of Swigart's wife Louise, testified that she frequently visited in the Swigart home and that "Mr. and Mrs. Swigart both spoke of Ena Welch as his step-daughter." Mrs. Hutchinson, a daughter of Mrs. Koontz, and thus a niece of Mrs. Louise Swigart, testified to the same effect. When Swigart's wife died, the minister who was called in, was Rev. Arthur W. Hoffman. He also conducted the funeral services for Swigart when he died. He testified that in talking with Swigart, at the time of the death of his wife Louise, Swigart told him he had written his "step-daughter"

asking her to return home and keep house for him but that she had refused to do so.

Much of the strongest and most reliable evidence in this case as we view it, was documentary. These documents contained the recorded statements of disinterested witnesses and, in some instances, of the parties directly concerned, which were made long prior to the time when the situation arose which gives rise to the controversy involved in this case. Oral testimony may be attacked on the ground of interest, bias, hope of reward, or perjury, and is subject often to the weaknesses of a faulty or failing memory. But not so with statements in writing or other documents, made when there could have been no point in not stating the truth and when no interest or bias could have existed. As was said by the court in Kent v. Manchester, 39 Barb. 595, "Recollections are sometimes vague, and impressions deceitful and illusory, but the written word stands and speaks a uniform language." Some of the documentary evidence offered in this case was from public records. "Such records are made at a time when there is no reason or temptation to falsify, and are kept in the custody of disinterested officers." Campbell v. State, 206 Pac. 632. It is significant that while the oral evidence is conflicting, all the documentary evidence in this case, unwaringly supports the contention of the respondents. In the course of the remarks made by the trial judge, when he announced his decision in this case, in which he stated "by what course of reason" he had reached his conclusion, he made no reference whatever to any of this documentary proof, most of which had been admitted over petitioner's objections, but some of which had been erroneous-

ly excluded.

Mrs. Koontz, the sister of Mrs. Louise Swigart, testified that Swigart at one time loaned her husband $300. The note given by Mr. Koontz in connection with that loan was received in evidence. On the reverse side of this note, was recorded an interest payment and following that appeared a statement signed by Swigart himself. There is no contention by petitioner that the signature is other than Swigart's. That statement reads, "I, Charles F. Swigart, so far as I am concerned, I cancel the within note which you see is bonefied by your Husband's signature if anything should happen to Lou or my step daughter Ena Welch so that they might want assistance & if in your power and will assist them so far as your are able."

In addition to this documentary proof referring directly to Swigart, - showing he considered her his step-daughter, the record contains other similar proof referring directly to Ena and showing she did not consider herself Swigart's daughter. This evidence consists of a number of letters, admittedly written by Ena to Swigart, in all of which she addressed him as "Dear Fred" or "Dear Mr. Swigart" and in none of which did she refer to him as her father or herself as his daughter, and none of them were signed as his daughter. Several witnesses testified that they had written letters to Ena for Swigart, in which he addressed her as his daughter and in concluding them referred to himself as her father, and Ena testified that she had written similar letters to him. Ena testified also that she had always made a practice of destroying all letters received by

her. But it is significant that the letters which had been received by Swigart from Ena and which were found in his effects after his death, and were procured in court, all addressed him in the formal manner described.

Even if it is true that Swigart sometimes called Ena his daughter, we would not consider that fact of great importance for it would not be unnatural nor unusual for a step-father to refer to his step-daughter in that manner. But the fact that he called her his step-daughter, as the foregoing proof conclusively shows, we consider of great significance in this case, for we cannot reasonably conceive of a father ever referring to his own daughter as "step-daughter." Pike v. Standidge, 187 Iowa 1158.

There is further documentary evidence in the record on this question. Ambrose A. Worsley, one of the conservators of the Estate of Swigart's insane sister Emma, had been a close friend of Swigart's for many years and had represented him as his attorney frequently. After Mrs. Louise Swigart died and Swigart was left alone and some attempt had been made to induce Ena to return home and keep house for him and she had declined to do so, Swigart's health began to fail and his eyesight became so poor that he could scarcely see. At this time Worsley wrote Ena a number of letters describing Swigart's condition and urging her to return and she wrote him in reply. Worsley took the stand and testified at the trial of this case, although he was acting as chief trial lawyer and continued to act as such throughout the trial. We shall refer to the direct cause of his testifying later. It was such as, in our opinion, entirely justified his doing so. We are

also of the opinion that he was justified in not withdrawing from the case as one of the lawyers conducting the trial, after the occasion had arisen which necessitated his testimony. He was apparently more conversant with all the complicated facts than anyone else. His long acquaintance with Swigart had placed him in possession of knowledge of facts which no one else was so familiar with. While on the stand he identified the correspondence he had with Ema shortly before Swigart's death. Some question arose as to the propriety of this, the claim being made that in conducting this correspondence he was acting as Swigart's attorney. We think it entirely clear that he was not. He was acting solely in the capacity of a friend. It appears from one of these letters that Swigart had not even asked Wrosley to write to Ema, but that he was doing so, as he put it in one of the letters, because "I feel it my duty to do what I am doing."

The most significant passage in this correspondence, occurs in Worsley's letter to Ema, dated June 27, 1917, in which he told her that Swigart "certainly would think as much of you <u>as if you were</u> his own child, if you would show a disposition to assist him now." If Ema was Swigart's daughter and he was her father, or even if Ema thought that relationship existed, that statement by Worsley in his letter to her certainly called for some reply from her to the effect that she <u>was</u> his daughter. Especially is this true when we examine this letter of Worsley's further and see that in it he remarked that Mrs. Louise Swigart, before his death, had wanted him to use his influence with Swigart to remember her (Ema) in his will; that Swigart had said he would like

to do so, if she would show enough interest to come and care for him; and had written further that "in view of the way your mother and yourself struggled for him * * * it seems like a nightmare to me that he should die and fail to remember you, substantially," but that if he should die "as he may at any time, without making a will, let me again call your attention to the fact that * * * there is no way whereby you can get a cent," for his estate would go the relatives "who have never, as he says, shown him any consideration, and you, who with your mother, was with him in his early struggles and poverty will be cut off," and he adds, "Must this state of things come to pass? I very much fear it will, unless you make an early response to this appeal." That statement did not escape Ena's notice. She not only testified she received this letter from Worsley, but the record of this case shows that at the hearing in the Probate Court, the presiding judge, while Ena was on the witness stand, called her particular attention to the phrase telling her that Swigart "certainly would think as much of you as if you were his own child, if you would show a disposition to assist him now," and asked her if she remembered that part of the letter and she said she did. But the record shows that Ena did not reply and say she was his own child or anything to that effect, but she merely declined to come and give up her position without some assurance of how much it was going to mean to her in the way of compensation, and referred to what the other "poor souls" (her mother and Louise) had passed through,

and also herself, in other years, when she was a member of the Swigart household and she said she did not propose to go through such an experience again. Worsley had suggested in his letter that she write a letter to Swigart and send it to him (Worsley) so he could read it to him, as Swigart's eyesight had so far failed him that he could not read it himself. She did write such a letter in which she addressed Swigart as "Dear Fred". This correspondence amounts, in our opinion, to a strong construotive, if not a tacit, admission on the part of Ena herself, that she was not Swigart's child. Another piece of documentary evidence bearing on this question is to be found in the claim for services filed in Ena's behalf against the Swigart estate on August 21, 1918, nearly a year after letters of administration had been issued in said estate to the public administrator of Cook County. This claim read as follows: "To services rendered by claimant to the deceased during his lifetime, extending over a period of years, said services consisting of household work, clerical work and generally looking after the deceased, and for which services decedent promised to compensate the claimant, which promise was repeated and the obligation acknowledged upon many occasions until shortly before the death of the decedent, $10,000.00." Attached to this claim was the affidavit of Henry B. Welch, Ena's brother-in-law, as her agent, in which he averred "that the annexed claim against the estate of Charles F. Swigart, deceased is just and unpaid, after allowing all just credits, and that she has no other claim against said estate." It was

not until over four years later, - in 1922, - that Ena advanced the claim that she was Swigart's daughter and sole heir. The explanation made of this, in Ena's behalf, is as follows: Mrs. Henry B. Welch testified that on the day Swigart was buried, Worsley returned to her home with her husband and Ena and herself, and spent the evening there; and at that time Worsley told Ena he would take charge of her affairs, - that "he would take full charge of her case and do everything he could; that there was no reason why she should not get everything that belonged to her father;" that Worsley gave Ena his card and she left her address with him and he said that 'if there was anything to be signed by Ena, Henry Could do it for her if she wasn't there." This was alleged to have occurred on October 19, 1917. Two witnesses testified that on that afternoon, as Mr. and Mrs. Henry Welch, Ena Worsley and the witnesses (one Scott, and the other Worsley's son) were on their way to the cemetery to bury Swigart, all of them riding in the same automobile, Worsley called Ena's attention to what had happened and the fact that the situation would probably have been different if she had followed his advice and Ena then said that she had probably made a mistake "but I could not live with Charley Swigart for all the money he had;" that Henry Welch then spoke up and said, "Why can't we claim that Ena is Charley Swigart's daughter," whereupon Ena said, "Henry, you know I am not Charley Swigart's daughter and I don't like you to talk that way. I would not be his daughter for all the money he has got." That conversation was denied by Mr. and Mrs. Welch and by Ena who claimed that one of the witnesses

referred to (Scott) was not even present upon that occasion.

Ema testified that in February or March, 1918, she came to Chicago and at that time visited Worsley's office and talked with him there and expressed surprise at not having heard from him, whereupon Worsley then told her, "Since I saw you last I was made conservator" of the estate of Emma Swigart, - "I represent her and therefore I can't represent you;" that she expressed her surprise, whereupon Worsley said further, "You know, Mrs. Welch, you are an illigitimate daughter of Swigart and therefore you have not got no leg to stand on towards the legacy." This was one of the things which Worsley deemed of sufficient importance to justify his taking the stand to deny, which he did. He testified that Ema had never been in his office, and so did his son. Henry B. Welch testified that he filed Ema's claim for $10,000.00, for services, after a conference with Worsley in March, 1918, in which Worsley told him that Ema "didn't have a leg to stand on" and that "her only salvation would be to file a claim for damages, - for services." This conversation was also denied by Worsley. Counsel for petitioner state in their brief that Henry B. Welch, following his conference with Worsley,(which Welch said occurred in March) "without advice from petitioner and without communicating to her, filed this claim (in August) and signed it himself, and afterwards notified petitioner of what he had done. Immediately he received a reply that she, petitioner, had never been a servant in her father's home, that if she was not his lawful daughter she was entitled to nothing, and directed him to immediately withdraw the claim. This information and direction was communicat-

ed to Worsley, and though this claim was filed in 1918, it still appears of record in the Probate court, impounded by order of court on Worsley's motion, and has never been disposed of." No abstract or record references are furnished for any part of that statement. We have searched the record in vain, for any support for such a statement except the fact that the claim was impounded, - when or on whose motion, if anybody's not appearing. No explanation is made of why it was, even on the facts claimed by petitioner, she failed to assert her claim that she was Swigart's daughter until over four years after this claim for services was filed, following the conferences she and her brother-in-law claimed to have had with Worsley in 1918.

In our opinion there is abundant evidence in the record to refute any such explanation of this matter as petitioner now advances. It is difficult to appreciate how any advice in 1918, to the effect that she had no standing as an heir of Swigart, could have surprised or mis-led Ena, after she admits having received a letter from Worsley, dated June 27, 1917, in which he told her that if Swigart "should die * * * without making a will, let me <u>again</u> call your attention to the fact that his affairs will go into the hands of our public administrator, <u>and there is no way whereby you can get a cent.</u>" After giving Ena that advice, apparently more than once, we cannot believe that Worsley entered into any such undertaking as it is now claimed he did on the evening of Swigart's funeral. It appears from the record that at that time he had already been appointed conservator of the estate of Swigart's insane sister Emma, and

Worsley testified he told her so at that time.

Furthermore, there is indisputable proof in the record, of the fact that Ena was being represented by other lawyers following the death of Swigart, and at the time she filed her claim for services. As early as three days after Swigart's funeral and her alleged employment of Worsley, she spent an entire afternoon in the law office of Edward B. Witwer, in consultation with him and at that time the relation of attorney and client was entered into between them. Witwer was not allowed to testify about that conference, counsel for petitioner objecting that Witwer occupied the position of an attorney for her, - though it appeared a third party was present at the conference. Witwer testified that he ceased "to be the attorney for Mrs. Ena Welch, the petitioner in this case" about five days after the conference referred to Why he did not represent her longer, does not appear.

It next appears that on December 28, little more than two months after Swigart's death, Ena, together with her brother-in-law, Henry B. Welch, consulted with two other lawyers, William Franz Anderson and Julius Quasser, the latter of whom testified that on that day he entered into a contract of employment with Ena, as an attorney. Upon her objection, all that took place between petitioner and this lawyer, was also excluded. The claim for services which was filed the following summer was sworn to before Quasser as a notary public, and his name appears on the reverse side of the claim, as attorney for the claimant. In view of that record, we are of the opinion that the petitioner was in no way

misled by any advice from Worsley, and that he had nothing whatever to do with the filing of her claim for services, directly or indirectly, but that she filed it while being represented by counsel not now connected with the case, one of whom, Henry Welch testified, was his cousin, and further that the position she later took, more than four years later, that she was Swigart's daughter, was a deliberate afterthought, after having advice from at least four lawyers which did not warrant such action.

While Henry E. Welch was on the stand testifying about the foregoing matter, he was asked whether he had communicated with one Cosgrove, township clerk of Wolfe Island, Ontario, within six months after his first conference with Anderson and Quasser. Objection to this question was sustained. Counsel then offered to prove that at the time referred to, Henry Welch communicated with Cosgrove and received information that Ema Welch was born on Wolfe Island in 1866 and that he delivered that information to Quasser who was then acting as attorney for petitioner. That offer was objected to and the objection was sustained. In our opinion, it should have been overruled. Cosgrove's deposition was taken, (by petitioner) and at that time he testified to receiving requests from Henry E. Welch of Chicago to search the records "to see if there was any record of the child born on the island (Wolfe Island) to Tom Jim Davis and Sarah Saunders." This witness then testified that he "saw there was no record," and he then advised Welch to write to Toronto, and Welch wrote back and asked him to do so and that he did as requested but got no reply.

In connection with the matter of birth records in Canada, the record shows that the law requiring such records to be kept was passed 1852. Because of this, much is attempted to be made of the fact that no record of Ena's birth on Wolfe Island in 1866 was found by Cosgrove. But the evidence further is (by the same witness) that the first birth records on Wolfe Island were made in 1869 and there were therefore no such records at all at that place in 1866. In our opinion, the significant thing about birth records in this case is that if Ena was born in Chicago, in 1869, as she contends, why does the evidence not contain that record?

Before we go further into the evidence upon the question of where and when Ena was born, we wish to refer to one other matter appearing in this record, which we believe bears directly on the question of whether she was Swigart's daughter or his step-daughter. A woman named Sarah Welch, no relation of the family into which Ena married, who was born and lived in Cape Vincent, whose father was the second husband of Mrs. Saunders, the mother of Sarah, testified that Ena told her that Swigart wanted her (Ena) to marry him but she said "she didn't want him;" that "she didn't like him," and "she would never marry him." Some of this testimony was admitted but on petitioner's motion, the last part of it was stricken, but on what ground does not appear. In our opinion this evidence was both competent and material.

We shall now refer to the oral testimony submitted in behalf of the petitioner in support of her contention that

her mother came to Chicago prior to 1869, and that she was born here in that year, Swigart being her father. Petitioner's witness Russell was born in 1865. He testified that he first knew Ena in 1872 and at that time "she was just a little child, could just start to walk around;" that they called her Ena Davis as well as Ena Swigart; that she first went to school in "about" 1875, when she was six years old, and that "she had to be six to go to school;" that he was four or five years older than she was. The witness Jeadwine testified he was born in Cape Vincent in 1852 and had lived in Chicago since 1873; that he knew Tom Jim but did not know any of the other members of his family; that Sarah came to Chicago in October 1866, "I think," - * * * "I am pretty sure that is when it was;" that he "Would not swear just the year she left there because it is an impossibility for me to remember the date that she left there;" that she had no child when she left; that he next saw her in 1871, when she visited her mother at Cape Vincent and she then had a little girl with her about three years old; that he talked with Sarah and told her he did not know she had a child and she said she was married to a man named Swigart "and I have got this little girl now." This witness testified to an occurrence which he said happened when he and another witness, Arnold, were present with Swigart and Sarah and Ena, when Sarah introduced Swigart, saying, "This is my husband and this is my little girl." He further testified that at that time Swigart addressed Arnold saying, "Jim, you know when this child was born I was working for you. This is my girl. I was working for you when she was born;" that Arnold replied, saying, "Yes, I remember you coming up there late one morning and (my) saying, 'Why are you late this morning, Charley,'"

and that he (Swigart) replied, "Yes, I had a new arrival at my house last night, I had a little girl at my house," and that he bought some drinks. Joadwine testified that this dialogue between Arnold and Swigart occurred in his presence in 1873. Why such an elaborate recital of such an event should take place before witnesses in 1873, does not appear. In the testimony which Arnold gave in this case he made no reference to it. Arnold did testify to a conversation he said he had with Swigart, similar to the one Joadwine said was recited in his presence, in 1873. Arnold said this talk he had with Swigart, in which the latter told him they "had a baby born at my house last night" occurred in August, 1868, - "that would be as near as I could come to it."

Christine Bohan testified that she was born in 1863 and that she lived near Swigart in 1869, '70 and '71; that Ena "must have" been around there between '69 and '70," * * * "I don't think she could be more than two years old then. She was a little bit of a thing. I held her in my lap and let her fall;" that she (the witness) was "around between six and seven years old." In a case such as this, where witnesses were purporting to recall situations which existed over fifty years before they were testifying, and where the placing of events, two or three years either way would make all the difference there was between the respective contentions of the parties, testimony that the individual involved "must have" been present "between '69 and '70" and that the witness "don't think" she "could" be more than two years old then and also attempting to fix the time by saying she (the witness) was "around between" such and such

ages, is so indefinite as to be of little, if any, value. Marie Charlette gave similar testimony, saying she saw Ena in 1876 and that she then was "about six or seven," and that Ena's mother told her that Ena was born in 1869, "I think." On cross-examination this witness testified that the neighbors called Sarah, "Mrs. Davis" and she also testified she thought Swigart was her brother, "because they all lived together." Again we find Francis E. Howard testifying that he first met Swigart in 1879 and that there was a young girl there "about" ten years, "I should judge." Another witness, Veirs, testified that he first saw the child in 1878 and that his "impression" was that she was six or seven years old then, - "might have been a little older."

The only witness mentioned by the trial court at the time he rendered his decision, who testified for petitioner, was Mrs. Slosson. This witness testified that her own child was born in 1865, and that she was four years older than Ena; that in 1873, on the occasion of Ena's birthday, she and Sarah made some cakes for the children. She knew Ena was born in 1869, because Sarah told her the age of the child. In 1875 or the fall of 1874, she said Swigart came in to the store kept by the witness, and bought a knit jacket and cap for Ena; that this occurred just before Ena went into school. This witness also testified that Sarah told her that her first husband's name was Davis and that he was killed. She testified that everybody supposed Sarah was Mrs. Swigart until Ena entered School and "then there was

a great scandal over the matter * * * they called her Davis at the Hayes school. Everybody talked about it all over town."

Mrs. Neagle was born in 1862. She testified that she first saw Swigart and Sarah in 1870. She was then eight years old. She said that Ena was then a year and a half old, - just beginning to walk; that when Sarah used to bring Ena into a store over which the witness lived, she "was possibly two years old * * * this has passed out of my recollection, somewhat." She testified that the Swigart family "moved away about in February 1870."

Mrs. Helen Hayes testified the Swigarts lived in a house referred to as the Carrol house and that she remembered a baby born in that house on February 4, 1869; that she knew her as Ena Swigart; and that the Swigarts moved into a house referred to as the Pasdeloup house in May or June 1869. Mrs. Mary Moore testified she saw the Swigarts living in the Pasdeloup house with a baby. She said she first saw Sarah the year of the fire or the year after. Mrs. Swanfield testified to the same effect. She was ten years old in 1869. She said the baby had a boy's name, - was called Ena James or James Ena; that she heard Sarah tell her mother that her first husband was killed shortly after they were married when she was living with her mother-in-law and that she had told the latter that if she ever married again "and had another child," that she would name it after her first husband, whether it was a boy or a girl. It is certainly extraordinary to account for the name James Ena, by admitting that the James comes

from Tom Jim, but that Sarah gave this girl, born of Swigart, the name of the "first husband."

One Joseph Danziger testified that he remembered the National Singing Fest held in Chicago in 1868; that he and Swigart were members of the singing society; that he had a conversation with Swigart "during that period," in which Swigart said another singer was coming, - "We will get a boy;" that he later said it was a girl and they all laughed; that he later saw a woman with a baby a few months old and Swigart said it was his wife.

Michael Wasserman testified he met Swigart and his wife in 1868 and after that saw them every day, as he was a near neighbor; that he and Swigart belonged to the same singing society; that on the night the child was born, Swigart asked the wife of the witness to come and stay with his wife while he went to get a midwife; that about a week later he saw Sarah in bed with the baby; that they called the baby Ena; that later when the singing society met in the Turner Hall, Sarah came with the baby and left it on a chair faced to the wall. On cross-examination, this witness admitted that some years before he had been convicted for "boodling" when he was a Cook County Commissioner, and he served a term in the penitentiary, - "but I didn't get anything * * * it was a newspaper conviction." He admitted further that he was "broke" when he was convicted and "I am broke today."

One Lawler, a brother of former Congressman Frank Lawler, gave testimony similar to that given by Danziger. Mrs. Gough testified she was born in Cape Vincent in 1847

and went to school with Sarah; that she saw her frequently after Tom Jim's death, but never saw any sign of maternity. The testimony shows conclusively that Sarah was not in Cape Vincent at this time but over on Wolfe Island, living with Aunt Sally. This witness also testified that she saw Sarah leave on the boat for Chicago, and this was in October 1868, "I think, - I am not real certain about that."

Charles Rice was another witness for the petitioner. He testified Swigart told him Ema was born in Chicago in 1869. The record shows that this witness had formerly been employed by Worsley as Conservator of the Emma Swigart Estate. On cross-examination he testified that "because of Mr. Worsley falling out with me as I stated, that determined me to come in as a witness and I then went to Mr. Trainer's (counsel for petitioner) office. That was the determining factor that caused me to be a witness." He further admitted that after he had testified in the Probate Court, Roach, one of the conservators of the Emma Swigart Estate had been his and asked him why "you didn't tell me about the daughter stuff that you testified to in the Probate Court * * * you always told me Swigart referred to her as his step-daughter," and that he, Rice, replied, in substance, "I know I did, - Swigart did refer to her as step-daughter, but I heard him say 'daughter' when he was drunk, and I was willing to do anything to beat Worsley." Another thing that discredits this witness, in our opinion, is the fact that he charged Worsley with misuse of estate funds and in this he was entirely discredited. He stated that at Worsley's direction he ordered lumber from the Western Lumber Company for use on a building belonging to Worsley,

and had it charged to the Swigart Estate. He also stated that he performed labor on Worsley's building, and at his direction made out a bill for it against the estate and received pay for it from the estate. He afterwards admitted receiving the personal check of Worsley, on the Harris Trust & Savings Bank, for labor he had performed. Rice said the lumber bill he referred to, amounted to $146. This testimony was the main cause of Worsley taking the witness stand himself. We have already stated that in our opinion he was justified in doing so, and, under all the circumstances, in continuing to act, with counsel associated with him representing certain collateral heirs, in conducting the trial. Heavely v. Harris, 239 Ill. 586. Worsley denied all the testimony of Rice on this point. He said he never directed Rice to have the lumber charged to the Swigart estate. He produced his cancelled check, drawn to the order of the Western Lumber Company, on the Harris Trust & Savings Bank, for $146.37. The manager of the Lumber Company identified the bill for the lumber. The bill did show a charge of $146.37, to the Swigart Estate, "care of A. A. Worsley," but the manager testified that it was paid by Worsley's personal check, in evidence. The evidence shows that the annual report of the conservators of the Estate of Emma Swigart was produced, and it showed no payment of a bill to the Western Lumber Company of any such item.

Alfred Saunders, Sarah's younger brother, testified for petitioner. He is a section foreman for the New York Central Railroad, living at Cape Vincent, New York. He was born in 1880 and was therefore five years

old when Tom Jim was killed. He testified that he saw his sister off on the boat when she left for Chicago in 1867; that he never saw Ena before Sarah came home in 1871; that she came home frequently while she was living on Wolfe Island, but he never saw a baby with her; that he never saw Sarah on Wolfe Island. This witness was a very young child at the time in question. If he was not over where Sarah was living at that time, on Wolfe Island, it is not surprising that he knew nothing of the events taking place there. Whether Sarah, upon the occasions when she went over to Cape Vincent, following the birth of Ena, took her with her or left her with Aunt Sally, does not appear. However, this witness must have been at home during the time Sarah was staying with her mother before she came to Chicago.

Another witness, Fred Arnold testified that he went to school with Ena in the Hayes School in Chicago; that he knew her as Ena Davis and also as Ena Swigart. He was asked when he first started to school with her and he answered that he would "imagine" it was 1875. He also said he was born in July, 1868 and that Ena was "about" his age, - five or six months younger. This testimony, as well as that of Joseph Scholl, was introduced in rebuttal. It was not rebuttal testimony. It should have been a part of petitioner's case in chief. Why it was not so introduced, does not appear. Scholl was born in 1859. He said he delivered milk at Swigart's house, when he was between nine and ten years old, and that there was a child born there in 1869. "I think it was, - close on to spring;" that another lady took in the milk that morning

and "said there was a newcomer in the house."

We shall now refer to the oral testimony submitted by respondents, tending to prove that petitioner was not born in Chicago in 1869, but that she was born at Wolfe Island, in Canada, in 1866, and that her father was not Swigart but was Tom Jim Davis. Testimony to this effect was given by approximately seventy witnesses. Some of those lived in Chicago, but most of them were people living on Wolfe Island or at Cape Vincent. Of the latter, some appeared in court, but the testimony of others was given by deposition.

Fourteen witnesses testified to conversations they had with Swigart, in which he told them he had no children of his own but he had a step-daughter, Ena, - that she was not his child. Two of them were brothers of Swigart's wife Louise. One was a cousin of Swigart's. Another was a physician who took care of Emma Swigart and was a fellow lodge member of Swigart's. Many other witnesses testified that Swigart referred to Ena as his step-daughter. Reference has heretofore been made to them.

Henry R. Baldwin, from whose testimony we have previously quoted, testified on the question we are now considering, that he met Ena at Swigart's home about the time of her mother's death; that Ena was introduced to him by Swigart; that,at that time, Swigart "said in substance that this was the daughter of Mrs. Davis' husband, Mr. Davis, calling him by name, whatever it was, and either he said, or Ena said, in theconversation which followed that her father died when she was a baby or before she was born, I am not

sure which it was. But she told me then in the conversation that she had no recollection of ever seeing her father and never did see her father." The integrity of this witness, so long a well known member of the Chicago Bar, needs no comment. That he could not be mistaken in his recollection of the conversation seems certain. The petitioner did not deny the conversation to which he testified.

Another Chicago witness for respondents was Mrs. Jenkins, who lived in the same neighborhood in which Swigart lived in 1887. We have referred to a part of her testimony previously. She testified further that Mrs. Davis talked to her about her family; that "she told me that her husband's name was Tom Jim Davis and she said he was stabbed to death and she told me that she was a bride, a widow and a mother inside of a year. Then she went to live home with her mother-in-law Aunt Sally, as they called her. * * * She told me * * * the baby was born in her mother-in-law's home, and she left there when the girl was about three or four years old, something like that, then she came here to Chicago. * * * She told me she didn't like to see her (Ena) on the stage; she thought the dancing part came from her father, because he was very fond of dancing. * * * She told me that there was a little argument between her and her mother-in-law about naming the child, because she wanted her named Thomas Ena, after her father, and her mother did not want the Thomas put on, so she just named her Ena." She testified that Ena was present at some of these talks with her mother. She also testified that Mrs. Davis told her that Ena was 21 years

old at the time of her marriage. (1887)

Over forty witnesses from Wolfe Island and that vicinity, testified for respondents, as to the facts surrounding the birth of Ena Davis, there, in 1866.

Ambrose Davis, who testified for the respondents, was a second cousin of Tom Jim Davis. He was born on Wolfe Island in 1855 and lived within fifty yards of Aunt Sally's tavern. He left the Island in July 1866 and returned in 1869. He testified that he knew Tom Jim Davis and the circumstances of his death and burial; that Tom Jim and Sarah had one child, Ena; that he first saw her when she was about three weeks old, in her mother's arms; that he attended the baptism of Ena at the school house, in June, 1866, and heard her baptised, "James Ena;" that after he returned to the Island in 1869, he again lived about fifty yards from Aunt Sally's and continued there for twenty years; that Sarah and Ena were th there when he returned; that he visited the Island seven or eight times between 1866 and 1869; and that he last saw Sarah and Ena at an apple paring bee, in October, 1869, at which time Sarah took the child home to Aunt Sally's and then returned to the party. He did not know when they left the Island.

William J. Gates was born in 1844, on Gates Island near Wolfe Island, and knew the Davis family. He described an occasion in 1869, when he rowed Tom Jim's father home in a boat when he was drunk, and he remained at Aunt Sally's all night. He testified that there was a baby girl there,- "I heard the child crying in the next room to me," and between the baby and the drunken old man, who was "a very noisy man" it made "quite a bit of amusement;" that the next morning at

breakfast, Sarah came into the room carrying the baby and said she had never had such a night, "between the baby crying and the old man making a noise." The witness identified a photograph of Sarah as the woman he saw there that morning, to whom Aunt Sally introduced him as "her daughter-in-law." He said Ena "was going on four years of age then." He also testified that "Tom Jim was a jolly fellow and on account of his being murdered and everything taking place, the birth of this child was something that was in everybody's mouth." On cross-examination this witness was asked what his interest was in this case and he said he had no interest "any more than to prove that this child is a daughter of Tom Jim Davis. I am interested just that much. * * * I am interested in whether or not it is proven here that she is a daughter of Tom Jim Davis because of common decency, - in decency and in honesty. That is the only purpose I have in this case."

James Goslin began to work for Aunt Sally in her garden when he was ten years old. He was thirteen years old when Tom Jim was killed. He testified that he was at Aunt Sally's when the baby was born,- "James Ena Davis was her name;" that at the time of the birth, the midwife asked him to get a pail of water and he "took it to the door and handed it to her, and she says 'you go to the barn' and I turned and went to the barn as she told me;" that three days later the midwife showed the baby to him. He continued to work for Aunt Sally for a year after that. This witness was not good on dates. He said he could just remember the Civil War; that Tom Jim was killed after the war but he could not remember

how long; that it was in the spring, - warm weather and that the baby was born at Aunt Sally's as cold weather was coming on,- it was "three months after Tom Jim was killed." It was shown that in the Probate Court this witness testified that the baby was born more than nine months after Tom Jim was killed.

George Eccles was born on Wolfe Island in 1859 and knew all the Davis family. His mother was an aunt of Aunt Sally's. This witness attended the school close by Aunt Sally's tavern, - the one in which Ena was baptized. Aunt Sally kept a small store at which the children bought candy and school supplies. He testified that Sarah Saunders was the wife of Tom Jim; that he saw Ena with her mother, Sarah Davis, at Aunt Sally's and that Sarah came to his home to sew for his mother, and brought Ena with her. He saw Sarah Davis "at Aunt Sally's, or around in the neighborhood after Tom Jim's death, three or four years."

Daniel Staley was born on Wolfe Island in 1849. He had been a member of the Municipal Council for his township and was its chairman for a time. His home was next to the school house, near Aunt Sally's. He testified that he remembered Tom Jim and his wife Sarah and the little girl whose name was James Ena Davis, - "she was around there three or four years and was grown up to be quite a child;" that he first saw her as a baby in her mother's arms and "some three or four years, anyway, after that." This witness said his grandmother married Tom Jim's uncle.

Richard LaRush was born on Wolfe Island in 1856. His family and the Davis family were related. He testified he knew Tom Jim as a baby,- that he had "seen him dance, and always remembered him;" that the woman he married was Sarah Saunders; that he saw Ena about Aunt Sally's; that he saw her as an infant in Sarah's arms; that he saw her about there for three or four years; that Sarah brought her with her when she came to visit the mother of the witness; that he last saw Sarah about four and a half years after Ena was born. There was a peculiarity about Ena's speech which was mentioned by many of the witnesses who knew her as a child and by others who knew her in later life. Ena claims she never had it until she was about school age, when she had an attack of scarlet fever, and several of her witnesses testify to that effect. Most of the Wolfe Island witnesses who describe Ena when they say they saw her as a little girl about Aunt Sally's, mention the fact that she then had this peculiarity in her talking. Richard La Rush was one of those who described it andhe said further, that he had heard Ena testify in this case, both in the Probate Court and in the Circuit Court, and that he noticed "the peculiarities in her speech" in the Probate court and the "same stammering here" in the Circuit Court. One of the things referred to by the trial court, in giving his reasons for finding that Ena was not the child of Tom Jim Davis but the child of Swigart, was a lack of "convincing proof of identity" between the petitioner and the Ena Davis on Wolfe Island. He said the Mrs. McGregor was the only witness "who testified that Ena Davis whom she knew was the same person as the petitioner herein." There is an abundance of evidence in the record on this question,

which the trial court seems to have overlooked. The testimony just referred to is one instance of it. It would be difficult to conceive of stronger evidence as to identity than the Baldwin testimony already quoted. We shall refer to other evidence to the same effect later.

John Gillespie was born on Wolfe Island in 1857, went to school near Aunt Sally's and "lived there until I was nineteen years old, alongside of Aunt Sally's place." He gave testimony similar to that of the other Wolfe Island witnesses. He said Aunt Sally introduced Sarah to him as her "daughter-in-law," and that he saw Sarah and her child Ena about there for "about three years and a half" after Tom Jim's death, - "when I last saw her (Ena) on the Island, she was quite a stout chunky little girl, able to run around everywhere."

Mrs. Olive Kelly was born on Wolfe Island in 1863. She testified she was "four years older than Ena;" that her mother was Tom Jim's first cousin and her father and Tom Jim were chums; that she remembered Ena as a baby in the arms of her mother, Tom Jim's wife Sarah. She also testified that she heard her mother and Aunt Sally talking about Ena, - "I have heard that talk that Tom Jim Davis and Sarah Saunders should have been married sooner than they were, - I can't put it any different." Mrs. Kelly's mother, Mrs. Irwin, was also a witness and on cross-examination she said she never said "Tom Jim and Sarah ought to have been married sooner." Counsel for petitioner use this in attacking Mrs. Kelly's testimony. Mrs. Kelly does not attribute that remark to her mother. As she testified, Aunt Sally may have said it. She merely says she heard those two talking together and that was the talk she

heard, but she does not say which one said it. This witness attended the school near Aunt Sally's. She mentions the peculiarity in Ena's speech, - "she had a little bit of stoppage and we would say, 'Say it, say it, say it.'" She says Ena was between four and five years old when she last saw her on the Island.

George Furner was born on Wolfe Island in 1853, and lived there continuously for sixty years. He testified that he saw Ena as a baby in her mother's arms, at Aunt Sally's. He identified a photograph of Sarah as that of Ena's mother. He said he often talked with Joe Saunders, Sarah's brother, about the child and that he told him "it was Tom Jim's and Sarah's child." This witness testified that the last time he saw Ena "was after she was grown up" at Joe Saunders, on Wolfe Island. "She was a young woman in long dresses," from sixteen to twenty years old. "I asked him who she was and he said she was Tom Jim's daughter * * * his niece Ena Davis * * * She was visiting Joe Saunders, her uncle; she stayed about three months * * * He said she was going on the stage." He was asked whether he ever had any further conversation with Joe Saunders about Ena Davis after he saw her on the Island, and he answered, "Why, I used to always ask where she was, how she was getting along. He told me she was in Chicago, on the stage * * * He told me she was on the stage." Here again we find convincing proof of identity. The reliability of this witness is vouched for by petitioner's own witnesses. Petitioner's witness, Theodore Briggs testified on cross-examination that he knew George Furner; that "he was right there on the Island all the time. He was born there. He was well acquainted with

Aunt Sally, Uncle Bill and Sarah Saunders. He was particularly well acquainted with Sarah Saunders because they were both from the old country. Talk is that their families came across the ocean together. Mr. Furner was with them a great deal, was always visiting them."

Mrs. Elizabeth Davis was born on Wolfe Island in 1854. She went to live at Aunt Sally's when she was about twelve years old, and saw Tom Jim before he was killed,- also Sarah, his wife. She testified that she was there when Tom Jim was killed and "saw his remains after he was stabbed;" that she helped take care of the baby when she was three months old, - "the full name of that child was James Ena." She also mentions taking care of Ena when "she was about two or three years old," and said that the last time she saw her "was about two years after Uncle Bill died." Uncle Bill died in 1870.

Mary Brooks, born on Wolfe Island in 1861, attended the school near Aunt Sally's. She testified she often went to her store "for candy and pencils and stuff for school and this little child," Ena Davis, was there. She was about two years old when she first noticed her and when she last saw her on Wolfe Island she was about five years old.

Ezra La Rush was born on Wolfe Island in 1858 and is living there yet. He gave testimony similar to the other Wolfe Island witnesses. He testified he saw Ena on the Island up to the time she was five years old. He testified to several occurrences involving Ena, - said her mother, in calling her, would sing out, "'Ena!' and you could hear it half a mile." He mentioned Ena's peculiarity of speech, - said he would

not call it stuttering but "a kind of catch in her voice," and described an occasion on which he "commenced to mock her, and I got a whaling from my mother for it."

Mrs. Spoor was the sister of Dan Staley, whose testimony for petitioner we have already referred to, and of Archibald Staley, who testified in rebuttal. She was born on Wolfe Island in 1850, the year after Dan and five years after Archibald. She testified substantially as her brother Dan did.

Mrs. Sudds was born in 1850, "down by Aunt Sally's." She gave testimony similar to the other Wolfe Island witnesses we have referred to. Her boy was born in 1868 and she testified she bought a baby carriage from Sarah when her baby was a year old, and she did not see Sarah after that, - "I asked her where she was going and she said 'to Chicago'". Charles Sudds also described the Davis family whom he knew well, as he lived "seven or eight rods" from them. He said Tom Jim was a "jig dancer;" that he did not know Sarah before she married Tom Jim; that when she first came, "I should judge she was about six months along * * * from what I observed, I should judge she was in a family way." The first part of that answer was stricken but the latter was admitted. It was all admissible.

Mrs. Kemp, (a sister of Theodore Eccles who was a rebuttal witness for the petitioner) testified in behalf of respondents. She was nine years old in 1866. She told of being in Aunt Sally's store on one occasion when Aunt Sally took her upstairs, "to see Tom's baby," Ena. She also testified on cross-examination, "I remember this particular baby

because of the fact that its father died the way he did, and it caused me to have sympathy with the mother."

Mrs. Grimshaw, another Wolfe Island witness, testified that she remembered Tom Jim, "and I remember about their having the baby;" that she did not see it as a little baby but remembered seeing Sarah with it, in the post office one day, when the baby was about two years old. She also said the baby "was very much talked about * * * people took more notice of the child on account of the child's father being killed the way he was." Another incident this witness referred to was the visit of Ena at the home of her Uncle Joseph Saunders, "when she was a young lady." The reason this witness did not see more of Ena as a child was probably due to the fact that her house "was about seven miles from Aunt Sally's" and also the further fact that "we never were intimate with the Saunders or with the Davis's, only Tom Jim * * * he visited our house," but "our folks did not visit, we lived six miles apart." Henry Grimshaw testified that both Aunt Sally and Sarah told him the baby Ena was Tom Jim's child. He also said he saw Ena "when she came back for the legacy." This referred to a small legacy left for her by the will of Aunt Sally. This witness testified that he talked with Spoor the executor of the will and the one who drew it.

John Rawley was working for Aunt Sally, hoarding cows and "doing chores" in 1869, when he was ten years old, and saw Ena Davis there then. He knew her name, "by her grandmother calling her that." He said she "was better than three years old" then.

Sarah Welch was the witness already referred to, whose father was the second husband of Sarah's mother. She was born at Cape Vincent, New York. She was not familiar with Ena as a little girl but "knew her when she was grown up." She said the first time she saw Sarah was "nine or ten months " after Tom Jim's death, when she was wheeling a baby carriage in the street. She also testified that the baby was born "about ten months" after Tom Jim died. "I heard about her just the same as about any child; they said that Sarah had a baby and that it was a girl." On cross-examination she said she thought it was "about six months after Tom Jim's death" when she saw Sarah with the baby.

Mrs. Irwin, already referred to, testified she saw Ena when she was an infant in her mother's (Sarah Saunders) arms. In one place in her testimony she said Ena was born seven months after Tom Jim's death and on cross-examination she said it was ten months. She attended the christening and said her name was James Ena Davis. She also testified that Sarah came to see her before she went away, and told her she was going to Chicago, because Richard, her brother-in-law had moved there, "from Oswego," and "I think maybe he will help me." She said Ena was about five years old when her mother left.

John Fargo has lived on Wolfe Island all his life. He testified about a talk he had with Joseph Saunders, Ena's uncle, "when the young lady came to Kingston with a troupe *** He said Tom Jim Davis had married his sister and this was his daughter, that was to be, in Kingston * * *

he related to me the time her father was killed in the Cape, but I remember that myself." Here is further evidence on the question of identity.

Emma Boyden was Joseph Saunder's wife. After his death, she married a man named Boyden. She testified that Joseph Saunders told her Sarah was Tom Jim's wife and Ena was their child who was born "up in Aunt Sally's hotel there." This was properly admitted under the pedigree rule. She testified that she saw Sarah and Ena, back on a visit in 1883, when Ena was seventeen years old; that she knew it was 1883 because her baby who was born in 1882, was a year old; that "Ena counted her age 17"; that she had her stage clothes with her, - said she was practicing for the stage. She was asked whether she ever talked with Ena about "Charles F. Swigart of Chicago," and she answered "about all she said was that she didn't like him." She was then asked, "What did she call him? She answered, "Swigart - she would not say Mr., she would call him Swigart."

This witness also told of another visit from Ena the year after her husband, Joseph Saunders, died in 1912; "She was in the house about half an hour, because some of the people were waiting for her outside, - some of the actors were in the rig." She said Ena sent her tickets to the "Madam Sherry Show." This witness testified that after Swigart died "they sent word to me and wanted to know if I knew of any relations;" that she then wrote Ena asking her whether she knew Swigart was dead and she wrote back and said she did "and she was going to Chicago for to try and get the

property." She testified that she burned up this letter when she gave up housekeeping. The testimony by Mrs. Boyden about this conversation with Ena was not denied. In our opinion it would be hard to find stronger proof of identity than is to be found in the testimony of this witness.

Mrs. Julia Lalonde testified about the Davis family and the circumstances of Tom Jim's death. She described a visit to see Sarah and the baby, - "My sister took me over there and then took my other little boy." She says it was herown child she took on this occasion. That she was in error, on that point, is apparent. She says herself on re-direct examination that she was ten or twelve years old "when I saw the baby in bed with Sarah." She was not married until 1878 and her first child was not born until 1879. The child she had with her when she went to visit Sarah may have been her youngest brother, who, she says, "was three or four months old at the time I went to see Sarah's baby." Counsel for petitioner offered the baptismal record of this child and also the certificate of a parish priest as to the marriage of this witness but the record shows that the court held these documents were not admissible, without further preliminary proof than was offered, and reserved his ruling on the objection made to them, pending further evidence laying a foundation for their admission. We are not able to find that any further evidence was ever offered or any further ruling made as to the admission of these documents.

Mrs. Boyden's sister, Mrs. Allum, was born on Wolfe Island in 1870 and testified about Ena visiting at her house.

She was asked whether she ever talked with Ena about her age. Petitioner's objection to this question was sustained, the trial court remarking, "It makes no difference whether she did or did not," meaning, presumably that it was immaterial. In our opinion it was very material. The witness said in answer to another question "she (Ena) was four years older than I was," which would mean that Ena was born in 1866. The answer was stricken. It was not strictly responsive as it was given to the question, "What talk did you have with her about her age?" Mrs. Marlow was born on Wolfe Island in 1845. She testified that Joseph Saunders was her neighbor and that he told her that Tom Jim's girl Ena was born after Tom Jim was killed. She also testified her oldest boy was born in September, 1866, and "she heard this little girl whom I was told was the daughter of Tom Jim (by Joseph Saunders, admitted under the pedigree rule) was born about four months before my son. I know she was older than him."

James H. Davis, the son of Richard Davis, Tom Jim's older brother, has lived in Chicago fifty years. Before coming to Chicago his family lived at Oswego, New York. He testified that he was at the home of his grand parents, Uncle Bill and Aunt Sally, on Wolfe Island in 1868 and at that time saw Sarah Davis, his aunt, and her child James Ena there, - "she was a little tot, only two or three years old * * * sitting in a highchair."

Mrs. McGregor, the other child of Richard Davis, Tom Jim's older brother, also testified for respondents. This witness was asked where she first saw the petitioner

in this case, and she answered, "I saw her at my grandfather's home on Wolfe Island in 1868. She was living there with my grandmother and her mother." She testified that she came to Chicago with her father and his family in 1873 and she next saw Sarah and her daughter Ena at her father's boat "here in Chicago in about 1874 or 1875," and at that time Ena was "about eight years old." She testified that Ena visited her home here in Chicago regularly up to the time she was about seventeen years old; that on one occasion when Ena was about twelve years old, the witness and her mother went to the Hayes School to see her. That petitioner attended that school is conceded. This witness testified "there was a reason why we did not visit her." (Sarah) She was asked what the reason was, and she answered, "Because my mother did not like the way she lived." This answer was stricken. In our opinion it should not have been. She testified that the last time she saw Ena was when she visited the home of the witness when she was twenty-one years old, with her husband, - "She was twenty one years old and she had just been married and she came for the legacy that my grandmother had left her, and my father had to go down town with her." This answer was stricken. It was not strictly responsive in part and in part it gave a conclusion. Counsel for respondents then sought to elicit the information by further questions, and they were objected to and the objections erroneously sustained on the ground of immateriality. The witness then testified "the next time I saw Mrs. Wna Welch after that time I saw her with her husband at my father's home, was in Judge Horner's

court. I knew her." This is the only identification testimony referred to by the trial court in connection with his decision. He seems to have rejected it on the theory that Mrs. McGregor "had a very remarkable memory," apparently because she testified to her memory of Ena when she, (the witness) was very young. We have already referred to the other testimony in the record on the subject of identity.

The children of Tom Jim's brother, William, were three daughters, Mrs. Stevenson, Mrs. Hedderson and Mrs. Kitchin. They all testified for respondents also. Mrs. Stevenson testified that Aunt Sally told her, "that I had a cousin Ena Davis, a daughter of Tom Jim; she told me that her son was killed and that he was a married man, he had married a woman by the name of Sarah Saunders just a short time before his death and that she gave birth to a little girl and they named her Ena. She gave birth to this child in my grandmother's house on Wolfe Island. The mother named her Ena and the grandmother gave her the name of James after her father and she told me she was going to leave a bit of money to Ena on her death, and she said it was because the child was left without any father, and her mother had a hard time to get along a keep herself." The part of this answer, referring to the money left for Ena by Aunt Sally, was stricken as was similar testimony as to what this witness said she had also been told by her father. In our opinion, it should not have been stricken. It was an inseparable part of the pedigree testimony of this witness as it helped to identify the individual

to whom the statement related, and was material on the question of relationship between that individual and Aunt Sally and the Davis family. This witness also testified that Aunt Sally told her Ena was born in her house " a couple or three months before I was born." The witness was born September 30, 1866.

Mrs. Hedderson was born in 1868. She gave pedigree testimony similar to that given by her sister, just referred to. She produced a tin type of a little girl a few years old which she said had been in the family album in her father's home, where she had seen it all her life. This was introduced in evidence as respondent's Exhibit 65. The card of the photographer who took it in Kingston, Ontario, appeared on the reverse side of it. Another picture which was exactly the same as Exhibit 65, was produced and introduced in evidence as respondent's Exhibit 71. This tintype was produced by the witness Mrs. McGregor, the daughter of Tom Jim's other brother Richard, and she testified that it had never been out of her mother's album until she brought it to Chicago upon the trial of this case, in the Probate Court. Mrs. Stevenson and Mrs. Kitchin, the other daughters of William Davis, testified to having seen Exhibit 65 at home in their father's album. There was also a tintype of Ena introduced in evidence by petitioner as Exhibit 3A, which came from a family album in Swigart's home. The card of the photographer on the reverse side of this tintype had been removed or obliterated. In his opening statement one of the petitioner's counsel said they were going to put "three of the greatest photographers in the

city" on the stand, who would testify that these three pictures were not of the same child. No such testimony was produced. That the three pictures are duplicates, is certain from even a casual examination of them. The significance of this documentary proof is apparent. Counsel for petitioner seek to destroy it by asserting in their brief that the testimony shows that at the time of Swigart's death there were two albums in his home in each of which there was a picture like petitioner's Exhibit 2A, and at that time these tin types were gone,and counsel then added, "The purpose of the disappearance of the tintype soon became manifest." In other words Worsley is charged with removing these two pictures from Swigart's albums in Chicago and "planting" them in the family albums of William and Richard Davis, in Canada. In our opinion the suggestion is untenable, in the light of the testimony of all the children of William and Richard Davis to the effect that they had seen these pictures in the albums of their respective families all their lives. As to the claim that the testimony shows that two such pictures had been in the Swigart albums and that these had been removed, counsel refer, in support of their claim, to the testimony of five witnesses without making any abstract or record references. An examination of the testimony of these witnesses discloses the fact that only one of them mentions the matter at all and that one is Rice. We have already stated the reasons why we do not consider his testimony persuasive.

Mrs. Kitchin, the third daughter of William Davis, gave testimony similar to that given by her sisters.

Another matter of controversy between the parties centered about some family bibles of Swigart's and the entries they were alleged to have contained. They disappeared but during the trial two of them were produced by a Mrs. Tierney who was a neighbor of Swigart's at the time he died. The third one was never produced. Counsel for petitioner charged Worsley with making away with it, and concealing the other two until the time when they were produced. There is a great deal of evidence about this matter. We shall not discuss it in detail. Again the witness Rice is one who gives important testimony in support of petitioner's contention. In our opinion, the record does not warrant the charge made as to these bibles against counsel for respondents.

Before referring to certain further documentary evidence in support of respondent's case, we shall refer to the evidence of certain Wolfe Island witnesses, which was offered by the petitioner in rebuttal. This consisted, for the most part, of negative testimony, - statements to the effect that the witnesses knew of no child born to Sarah on Wolfe Island. Negative evidence is usually entitled to little weight as against positive evidence. As the United States Supreme Court said in Stitt v. Huidekopers, 17 Wall. 385, "he who testified to a negative, may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed." Upon examining the testimony of these witnesses, it appears that their opportunities for seeing the child on Wolfe Island or in other places where she was before coming to Chicago, were not good. Archibald Staley was a witness who did have such opportunity, however, for he lived near Aunt

Sally. He testified he saw no signs of approaching maternity in Sarah, following Tom Jim's death. He says she left Aunt Sally's in the spring of 1866, and he lost all trace of her, (Sarah) until she returned to visit and at that time there was a child with her. He is quite uncertain in many respects in his testimony. He said "I must have" lived at home when Tom Jim Davis was killed, - "I was farming." He testified Uncle Bill died "before Tom Jim died, * * * that is my best recollection." The record shows conclusively that Uncle Bill died five years after Tom Jim was killed. In a deposition that was taken before this witness came to Chicago, to testify, he was asked how long it was after Tom Jim was killed that Sarah left Aunt Sally's, and he answered that it might be six months or a year, - that he would be safe in saying that it was not ten years but it might be five or two, "for you see I have no positive recollection about the time. I have no dates." On cross-examination he admitted he "held himself aloof from the tavern" that was at Aunt Sally's, and further, that, when giving his deposition he said he "had no positive recollection of a child, and I say that now * * * I said I could not swear to a child, - that there might have been a child or something like that."

Counsel for respondents offered in evidence two letters written by Archibald Staley to his brother Dan, who testified for respondents, as tending to impeach him. He admitted writing them. In our opinion the trial court erred in excluding them. In one of them he suggested to Dan that he and their sister Harriet (Mrs. Spoor who also testified

for respondents) "remain neutral if you prefer that Ena Welch get the estate in preference to a number of lawyers, as there is no lawful heir but her." He referred to the fact that no one living could swear that Ena was a daughter of Tom Jim Davis, "as it would be necessary to be in the room when a child was born to do that in strict point of law." He also referred to the fact that "there is no registration of her birth to be found although a few, besides you and Harriet think she was born on the Island." In the other letter he called his brother's attention to the fact that Ena "had lived with her mother as the daughter of Mr. Swigart * * * and did the duties of a daughter for many years. This alone should give her a stronger and more just claim" than anyone else. He also mentioned her need for the money. He closed this letter by saying, "If you and Harriet regard my suggestion you will do no injustice to anyone, but if you emphasize what you remember against Mrs. Welch you will not accomplish as much good as if you do what you can conscientiously now to help her get what I believe she is justly entitled to."

Theodore Eccles, who has lived on Wolfe Island all his life, and knew the Davis family, testified that he did not know "Whether there was a child born to Sarah Davis * * * not that I know of." His testimony discloses that he was a sailor, - "I was at it through the '70's and possibly some before that." Presumably, however, he would be home during the winter, although he did not say so. A letter from this witness to his sister, Mrs. Kemp, who testified for respondents, was admitted in evidence, in which he [illegible]

referred to his recent trip to Watertown where he had gone to give his deposition in this case, and then he said, "Well, that is all wrong. There was a child called Ena born at Aunt Sally's and christened in the school house, etc. If you can remember anything about this matter let me know when you write again. There is a half million dollars at stake, but Ena would get about $10,000 as the money comes from the step-father's estate and who has a sister who is also a claimant, but insane. It would take me two hours to tell you all of it and more to come." He then tells his sister of his activities "in looking up information for the Chicago people." This witness is further shown, by another offer of evidence which in our opinion the trial court erroneously excluded, (because of a stipulation the parties had previously entered into) to have had a conversation with one of the lawyers representing petitioner, in which the latter told the witness that he had some to Canada "to prove that Mrs. Tom Jim Davis never had a child born to her on Wolfe Island," to which the witness, Eccles had replied, "you are up against the biggest thing in your life if you can prove it." This offer of evidence was further to the effect that Eccles had later advised the lawyer that there were witnesses in Kingston who knew all about the birth of Ena Davis on Wolfe Island. The offer also involved proof that Eccles had stated to one King that when he (Eccles) and Cosgrove and one James Davis were discussing this case with the lawyer referred to, the latter said to them, "it will not hurt any of you to stretch your conscience a little in this matter." The offer also involved proof to the effect that Eccles had

stated to King that in 1918 he and Cosgrove had made a thorough investigation about the birth of Ena Davis on Wolfe Island and that Cosgrove made a written report to the effect that Sarah Saunders and Tom Jim Davis had been married in 1865 and shortly thereafter Tom Jim had been killed and that in the spring of 1866, Sarah had given birth to a girl at Aunt Sally's and that her name was Ena Davis; that he (Eccles) had read that report, which was addressed to Henry B. Welch, Chicago, and that he knew the report was mailed to Welch.

Another witness for petitioner, in rebuttal, was Wayne B. Brewster, who lived in Cape Vincent. He testified Sarah continued to live on Wolfe Island after her husband's death, and "I think she came back to the Cape in the spring of 1867, to thebest of my judgment. I think she went away that fall * * * After she returned in the spring of 1867 I saw her quite often." On cross-examination he said that he never visited Sarah Davis after she returned to the Cape and never went near the place where she lived,- "only saw her on the street."

There were a number of other witnesses who have lived on Wolfe Island or at Cape Vincent, who testified for the petitioner on rebuttal. Their testimony, for the most part, referred to things they said they did "not know of" or that they "did not remember." In nearly every instance they admitted on cross-examination that they did not know whether Sarah had a child born to her in Canada or not. One of them (George Ledford) did testify, however,

on direct examination by counsel for the petitioner, that he did see signs of pregnancy in Sarah before Tom Jim's death. He was then asked, "Was there ever a child born to her," and he answered, "I never remember no child there, good, bad, or indifferent." He testified further that he started sailing when he was 16, which would be in 1868, for he was born in 1852. Another of petitioner's rebuttal witnesses (George F. Todd) testified he had to consult his wife as to when Tom Jim was killed. He continued, "I wouldn't be sure what year it was. I went by the house and saw Sarah Davis there with a child, two or three years after Tom Jim died. The little tot was two or three years old, - something like that."

Counsel for petitioner attempted to show that the Ena Davis about whom the Wolfe Island witnesses for respondents testified was not the petitioner but was really Georgiana Davis, the daughter of Willard Davis who also lived on the island. She is mentioned by nearly thirty of the witnesses. Petitioner's witnesses said she was called "Ena" while many of respondents' witnesses said she was never called "Ena" but "Georgia". Among the latter were half a dozen or more witnesses who had been her schoolmates. In our opinion there could be no confusion between the two children. Georgiana was the older of the two, some of the evidence tending to show she was born in 1862 and some was to the effect that it was in 1859. In our opinion this contention as to confusion in the identity of the two children was entirely eliminated from serious consideration by petitioner's own witness, Briggs. This witness testified that he

did not know whether Sarah had a child born to her at Aunt Sally's or not, - "I can't swear to it. * * * I never knew she had a child until I saw her at Aunt Sally's with the child * * * when she came back to visit." He was then asked about the child Georgiana Davis, and he testified that "she was quite a large girl before I saw this girl at Aunt Sally's. There is no doubt in my mind that this little girl, Williard Davis' daughter (Georgiana) was a big girl five or six years old before I saw the little girl running around Aunt Sally's * ** There is no doubt in the world. * * * I never noticed Georgiana with Sarah. There would be no occasion for confusing the little girl known as Georgiana or as Ena with the little girl at Aunt Sally's I saw at the time. They were two different children."

Finally, we shall refer to five further pieces of documentary proof, strongly tending to corroborate all the testimony for respondents to the effect that petitioner was born in 1866, in Canada rather than in 1869 in Chicago, and so tending to disprove her claim to being a daughter of Swigart. Counsel for respondents offered in evidence the marriage license issued to James A. Welch and "Ena J. Davis," the petitioner. It was dated July 19, 1887, and in it her age is given as 21 years. It showed she was married on the following day by Dr. Jenkin Lloyd Jones. That she was married to James A. Welch in 1887, she admits. Her brother-in-law testified as to the performance of the ceremony by Dr. Jones. That she was 21 years old at that time, was testified to by several witnesses. The trial court erred in sus-

taining petitioner's objection to this offer of proof, in our opinion. It comes within the class of evidence known as ancient documents. Lunger v. Seehrest, 188 Ill. App. 531.

The court admitted in evidence, a letter from Ena's grandmother (her mother's mother) to Swigart, sent in August 1897, in which she refers to Ena as 31 years of age, again showing she was born in 1866. There was also admitted the page of an autograph album of Ena's, which she signed "James Ena Davis," on the day she was married, July 20, 1887.

One of the witnesses for therespondents, was Joseph B. Gratton of Kingston, Ontario, who had been in the employ of a large grain company of Canada, Richardson & Sons, for many years. He testified that his attention was first called to this case when he heard it being discussed in a group of several people, of whom Ezra La Rush was one, and the latter remarked that he had been to Chicago on the case and he gave some of the circumstances, and the witness then told him he had met the woman in question, Ena Welch, and that he had her name in a book. He said he could not remember the year when the girl was there, but he recalled the circumstances. "It was the first troupe that opened the Grand Opera House after they had a fire there," and he testified he told La Rush to go to the Opera House and get the date. "Dick La Rush brought me the date the troupe played in the city and that gave me some light as to where to look for the signature."

He testified he was superintendent of the elevator in 1902, at Kingston, which is located "down where you take

the boat over to Wolfe Island;" that Ena Welch came to the elevator with several other girls of her Company, - five altogether, - and he took them through the elevator; that Wolfe Island can be seen from the top of the elevator; that the petitioner asked him where Wolfe Island was, and he pointed it out and she then remarked, "I was born on Wolfe Island." He also testified that she put her name and the date on the current page of the elevator weigh book. The book was produced and the page in question was admitted in evidence. It shows the signature "Ena Welch, Dolly Varden Company, N.Y. City, Jan. 15th 1908." Here we have further evidenceof identity.

The petitioner in this case, in the course of her testimony, admitted her visit to the elevator in Kingston, at the time referred to, with her companions of the Dolly Varden Company, and admitted her signature and the fact that she had talked with Gratton and asked him to point out Wolfe Island to her and that he did so, but she said that the remark she made was not that she was born there, but that "my mother lived there, and that I had been over there when I was a little girl and that is about all."

In March, 1915, the petitioner signed an application to the Prudential Insurance Company for a small policy of insurance. This furnishes further evidence of identity. In this application which was admitted in evidence, her place of birth is given as "Canada". She admitted her signature on the application but testified that she signed it in blank and that when she saw it a few weeks later it was filled out but she did not read it. The inference was, the agent filled

in the blanks on the application without any information from the petitioner. It would be exceedingly strange if he picked out Canada as the designation of her birthplace, independently of the applicant. She said the agent was a man named Tilly. The name of the agent appearing on the application was Hollander. The latter testified for respondents that he knew the petitioner, and that he solicited her for this insurance; he identified the application referred to above, as the one made out at that time and said he saw Mrs. Welch sign it; that before she did so, he asked her questions and she gave him the requested information, and he wrote down the answers she made, and that that written record constituted the application introduced in evidence. After it was filled out, Hollander said, he turned it in to the Company's district office. The petitioner was asked how she came to sign the application, "Mrs. James Ena Welch" and she said that was her married name. As already pointed out, her husband's name was James A. Welch. That she did not acquire the name "James Ena" from her husband, is obvious. Counsel for petitioner point out that the date of Ena's birth is given in the application as February 4, 1875. In our opinion that indicates nothing except the willingness to gain the benefit of a lower premium than she was entitled to, even on her own theory as to her age. The record shows that petitioner attempted to prevent respondents from securing this application from the insurance company.

Several offers were made by counsel for respondents to prove attempts made to suppress evidence by those working in petitioner's interest. There was an offer to show that on one occasion a representative of petitioner told a witness

"there would be some easy money in it if she kept away from Chicago;" that Chicago was a dangerous place. In our opinion, the trial court erred in sustaining petitioner's objections made to those offers. People v. Spaulding, 308 Ill. 382.

That inconsistencies appear in the testimony given by respondents' witnesses, has been urged upon our attention. There are such. Inconsistencies and discrepancies in the testimony of a large number of witnesses, especially when referring to incidents which happened some years ago, more often than not, furnish the earmarks of truth. If they all agreed in all things involved in their evidence, we would doubtless be told, and not without reason, that their accounts could not be genuine.

This case presents a record of over 7700 pages. It includes the testimony of a few less than 300 witnesses. The judge who heard the issues presented in the Probate Court, found that Ena was not the daughter of the deceased, Swigart. The judge who heard the case on appeal, in the Circuit Court, found that she was. In view of these opposite findings, of the large amount of testimony presented and of the nature of that evidence, and of the fact that we are clearly of the opinion that the finding of the Circuit Court is against the manifest weight of the evidence, we have reviewed the evidence and stated the reasons for our conclusions at much greater length than would have been justified, had those elements in the situation not been presented. In our opinion the judgment appealed from could not be permitted to stand, if it were considered without regard to the documentary evidence in the

record. When that is added, all of it being strongly in favor of the respondents' contentions, we are of the opinion it cannot reasonably leave a doubt of the fact that the petitioner in this case was born on Wolfe Island in Canada in 1866, the daughter of Tom Jim Davis.

For the reasons stated, the finding and judgment of the Circuit Court is reversed with a finding of facts.

JUDGMENT REVERSED WITH A FINDING OF FACTS.

TAYLOR AND O'CONNOR, JJ. CONCUR.

FINDING OF FACTS:-

We find as facts; that Charles F. Swigart and Sarah Saunders Davis, did not enter into a common law marriage in 1868, or at any other time; that the petitioner, Ena Welch, was not born in Chicago in 1869, as the daughter of Charles F. Swigart, but that she was born on Wolfe Island in Canada in 1866 as the daughter of "Tom Jim" Davis; and that said petitioner is not the heir of Charles F. Swigart, deceased.

75 - 29483

FIRST TRUST AND SAVINGS BANK, a Corporation, and LOUIS BOISOT, Trustees,

Plaintiffs in Error,

vs.

JAMES McCANN et al., etc.,

Defendants in Error.

239 I.A. 658

ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error seek the reversal of an order entered on May 15, 1924, in and by which the receiver of the Chicago and Interurban Traction Company was directed to thereafter pay his employees, who were members of Division 241 of the Amalgamated Association of Street and Electric Railway Employees of America, certain wages.

The order was in part retroactive, in that it also directed the payment of wages at a certain rate from October 16, 1922. The order was based upon certain facts recited at length in it, and the plaintiffs in error objected and excepted to the findings of the court and to the entry of the order, and jointly and severally prayed an appeal from said order to this court. The objections and exceptions were overruled and the prayer for an appeal denied.

It appears that the First Trust and Savings Bank, a corporation, and Louis Boisot, trustees, as complainants filed their bill on October 11, 1922, for the purpose of securing the foreclosure of a mortgage made by the defendant Chicago & Interurban Traction Company, which, as alleged, had issued bonds in the sum of $1,350,000, secured by the mortgage sought to be foreclosed. The

Chicago & Interurban Traction Company, a corporation, was made defendant to this bill and entered its appearance, and on the same day W. W. Crawford was appointed receiver of the company.

The certificate of evidence upon which most of the errors assigned and argued by complainants (plaintiffs in error here) are based has been stricken, and the defendants in error (intervening petitioners) have moved to dismiss the writ of error. This motion has been reserved to the hearing.

The ground for the motion is that the principal defendant to the record in the trial court, the Chicago & Interurban Traction Company, has not been made a party to this proceeding.

An examination of the cases cited indicates that the law upon this subject is well settled. A writ of error, unlike an appeal, is a new suit, and unlike an appeal, it requires that the whole record shall be searched and examined.

A writ of error is a writ of right, not depending on the provision of any statute. The right exists wherever the common law is recognized, and as was said in Cooke v. Cooke, 194 Ill. 225, "The writ of error must agree with the record, and in order to bring the decree up for review by writ of error, all who were defendants in the original suit who are alive must join in the writ of error, so that the whole case may be disposed of and that the record may agree with the record below. McIntyre v. Shelty, 139 Ill. 171; 2 Ency. of Pleading and Practice, 185." Of the numerous cases to which reference might be made, we refer to only a few. Scott v. Great Western Coal Co., 220 Ill. 42; Wells v. Murphy, 126 Ill. App. 103; Clark v. Zaleski, 268 Ill. 427.

The theory of the complainants seems to be that as the proceeding upon which the order was entered was only a collateral

one, and the corporation was not made a party to it, and as the receiver was in some respects the representative of the corporation (Reserve Fund Life Association v. Smith, 169 Ill. 264; Chicago, Peoria & St. Louis Ry. Co., Petitioner, v. Terminal R.R. Association of St. Louis, Intervening Petitioner, 174 U. S. 182) it was unnecessary to make the corporation itself a party to the writ of error.

This contention is not sound. The receiver is in the position of a stakeholder as between the parties. The defendant corporation has not been dissolved nor, in so far as this record shows, has it been declared insolvent. The purpose of the rule which requires all parties to the record in the suit below to be made parties to the suit in the Appellate tribunal is to prevent the multiplicity of suits. There can, we think, be no doubt on this record that any adjudication that might be made would not be binding upon the defendant corporation, and that it would have the right to sue out another writ of error.

In this state of the record the motion must be granted, and the writ of error will therefore be dismissed.

WRIT DISMISSED.

McSurely and Johnston, JJ., concur.

134 - 29969

4767a

ABSA COHEN,
Defendant in Error,

vs.

FRANK BISCO, alias FRANK FICO,
alias FRANK BICIO,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

239 I.A. 659

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This writ of error is brought by the defendant to reverse a judgment entered in favor of the plaintiff in the sum of $3500. The plaintiff has not appeared in this court to support the judgment.

Assuming under our rule that the statement of plaintiff in error is correct, it appears that plaintiff sued and summons issued to the March term of the Circuit court but the summons was not served; that an alias summons issued to the July term and that defendant was served on June 27, 1922; that on the 13th day of November thereafter the suit was dismissed with judgment for costs against plaintiff for failure to prosecute; that thereafter the court set this order aside without notice to defendant, reinstated the case, set the hearing of the same for December 15th thereafter, at which time the default of defendant was entered, and upon an ex parte hearing judgment rendered against him in the sum of $3500.

Defendant asks that the judgment against him be reversed and that the judgment entered on November 13th in his favor be permitted to stand. This request will be granted in part only.

The judgment against defendant will be reversed for the reason that the matter was tried without notice, and the cause remanded for a new trial.

REVERSED AND REMANDED.

McSurely and Johnston, JJ., concur.

148 - 29092

PETER TUTELES,
Plaintiff in Error,

vs.

ALEX G. JAVARAS and CHICAGO TITLE & TRUST CO., Trustee,
Defendants in Error.

239 I.A. 659

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This writ of error is brought by the complainant to reverse a decree by which his bill was dismissed after demurrers thereto had been sustained.

The defendant argues that complainant cannot successfully assign error, as the decree was entered on the motion of complainant. However, the motion was made after the demurrers were sustained and complainant elected to stand by his bill. This brings the case within an exception to the general rule and was the proper practice under the circumstances. Knapp v. Marshall, 36 Ill. 63; Weaver v. Fayer et al., 70 Ill. 567; Peru Plow and Wheel Co. v. Sandwich Enterprise Co., 77 Ill. App. 653.

The controlling question in the case is whether the bill states facts which entitle the complainant to the relief prayed.

The bill alleges that complainant and defendant had theretofore been partners in certain real estate transactions; that on June 6, 1923, the parties entered into a written agreement, whereby it was provided that premises which the partnership owned should be sold subject to certain incumbrances which the purchaser would assume and agree to pay, together with certain other obligations enumerated.

The bill also alleges that, pursuant to this agreement, the real estate was sold and defendant became the purchaser; that complainant executed and delivered a deed to defendant, he agreeing

to assume the incumbrance of a trust deed against the real estate, amounting to $75,000, and the claims of certain contractors on account of improvements made upon the premises.

The bill alleges that the interest on the incumbrance has become due and that defendant has not paid it, and that the claims of these contractors have not been paid by defendant as agreed; that complainant is contingently liable therefor; and prays that the contract may be rescinded and the deed set aside.

There is in the bill no allegation that defendant is insolvent or that the property is not worth more than the total amount of these claims against it. For aught that is alleged in the bill, the complainant has an adequate and complete remedy at law for his supposed impending injuries as set up in the bill.

The facts as set forth fall far short of stating a case justifying a rescission of the contract or the deed. Our attention has not been called to any case where it is held that the failure of a solvent grantee to pay a debt assumed will entitle a grantor to a rescission under the circumstances here alleged. Thurmond v. Thurmond, 87 S. W. 878.

The bill does not state facts justifying relief in a court of equity, and the decree will therefore be affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

174 - 30025

H769a

HARRY P. HAFER, Doing Business as HAFER COAL CO.,
Appellee,

vs.

MARY SWIFT and GENEVIEVE SWIFT,
Appellants.

239 I.A. 659

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants for coal alleged to have been sold and delivered at an agreed price on or about October 9, 1923. There was a trial by the court and a finding and judgment in favor of the plaintiff.

It was admitted on the trial that the coal in question was delivered to the premises at 6701 Merrill avenue, Chicago, on the date alleged, and that it was ordered by one Wilkinson and charged to him on plaintiff's books.

Defendants took title to the premises in question by deed from Wilkinson and wife, dated August 29, 1923, giving in exchange therefor other real estate situated on South Park avenue. While the deeds were placed in escrow on August 20th, the trade was consummated by the delivery of the deeds on October 19th thereafter. There was an agreement between Wilkinson and defendants that the coal, rents, etc., were to be adjusted as of September 1, 1923.

The trial court was of the opinion that since the defendants received the rent for the building they were liable for the coal used in warming the building, and on that theory, apparently, found for the plaintiff.

However, the defendants were liable under their agreement to account to Wilkinson, not to the plaintiff, for the reason that there was no contractual relation between plaintiff and de-

fendants. Defendants' promise was to Wilkinson, not to the Hafer Coal Company. Nor does it appear that any promise was made to Wilkinson for the benefit of the Coal company.

Plaintiff has not appeared in this court in behalf of the judgment rendered, and it will be reversed with judgment of nil capiat here.

REVERSED WITH JUDGMENT OF NIL CAPIAT.

McSurely and Johnston, JJ., concur.

182 - 30034

4770

JOHN B. ANDERSEN,
Appellee,

vs.

ST. MARY'S TRAINING SCHOOL,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

239 I.A. 659

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Although the rules of this court have been disregarded by the defendant, who appeals, we gather from the statements of fact made by attorneys for the respective parties that plaintiff sued for an alleged balance due on account of the purchase and exchange at different times during the years 1920 and 1921 of certain horses and a mule; that defendant filed a plea of set-off, claiming a balance due from plaintiff to defendant of $493.75 on account of the sale and delivery of certain hay; that to this claim of set-off plaintiff pleaded payment; that there was a trial by jury and a verdict in favor of the plaintiff for $1290.35 with interest; that plaintiff thereupon remitted the interest, motions of defendant for a new trial and in arrest of judgment were overruled and judgment entered on the verdict.

It appears that the defendant, St. Mary's Training School, is an institution located about a mile northwest of the Village of Desplaines in Cook County; that it was incorporated for the purpose of housing and educating dependent children; that it owns about a thousand acres of land, which are improved by various buildings, dormitories, etc.; that it conducts an industrial department for the teaching of the trades, farming, etc.; and that a large portion of its land is in fact used and operated as a farm. The defendant also owns and operates a farm of about 750 acres near Libertyville, Illinois, about fifteen miles north of Desplaines.

At the time the matters occurred out of which this suit arises plaintiff was engaged in farming and also in the business of buying, selling and trading horses. In September, 1920, one Fred S. Plaaten was employed by the defendant as its farm manager and continued in that position until about September 14, 1921, when his relations with the defendant institution were severed, and it would seem that his whereabouts at the time of the trial were unknown; at any rate, he was not produced as a witness.

The evidence for the plaintiff showed that his dealings were with Plaaten; that in the fall of 1920 Plaaten came over to plaintiff's place, stated that he would like to trade off some of the old horses for young horses, paying money for the difference. Quite a number of deals of this kind were made during the year, and the evidence tends to show, as the jury found, that the balance due upon these deals was the amount of the verdict of the jury.

The defense presented at the trial was that Plaaten was unauthorized to make these transactions for the defendant in the trading of the horses, and that he was without authority to receive payment for the hay which plaintiff admitted he had purchased, but testified that he had paid the price thereof to the defendant through Plaaten.

The defendant invokes the rule of law that a party dealing with an agent is bound at his peril to ascertain the scope and extent of the agent's authority, citing, with other authorities, Jackson Paper Mfg. Co. v. Commercial National Bank, 199 Ill. 151; and Merchants National Bank of Peoria v. Nichols & Shepard Company, 223 Ill. 41. That such is the rule where an agent assumes to exercise powers of an extraordinary character, such as that of borrowing money or making and endorsing negotiable paper, may be conceded; but ordinarily the rule is, we think, that a principal is bound, in so far as third persons are concerned, by the apparent

authority which the principal has conferred upon the agent. The distinction has been pointed out by this court in Hedges v. Bankers Surety Co., 152 Ill. App. 372.

The uncontradicted evidence here shows that Plaaten was employed as manager and assumed to exercise the powers and duties of a manager. Father Doran was the superintendent of the defendant institution, and he and Plaaten jointly drew checks against an account kept in the name of the Agricultural Department. The evidence shows that there was an office of which Plaaten was apparently in charge; that these occasions upon which horses were exchanged were at various times and covering many months. The advent of a new horse on a farm is quite an event, and it seems improbable that these exchanges could have been carried on without the knowledge of everybody about the institution. We think there was evidence from which the jury might properly find that Plaaten was duly authorized, and the fact that Father Doran was not called as a witness tends strongly to corroborate this view.

Even if the authority of Plaaten was doubtful, we think the jury might well have found that his actions in these matters were ratified, since the uncontradicted evidence (which the plaintiff has presented to this court by an additional abstract) shows that the institution kept the horses obtained from plaintiff and used them on the farm. Moreover (as the plaintiff points out) defendant could have produced positive evidence that it did not receive the money which plaintiff testifies he paid Plaaten for the hay, if that was the fact.

The verdict of the jury is not against the weight of the evidence and the judgment is, in our opinion, just and it is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

192 - 30044

CHARLES H. PRESTIN,
Appellee,

vs.

PAUL H. TULUPAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

239 I.A. 660

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for injuries alleged to have been sustained through the negligent driving of an automobile at the intersection of Clark street and Deming place in the city of Chicago, on June 29, 1921.

There was a trial by jury and a verdict of guilty, with damages in the sum of $1,000. There was also a special finding by the jury that defendant was driving the automobile in question at the time of the accident. There were motions for a new trial and in arrest of judgment by defendant, which were overruled; but there was not, so far as the record discloses, any motion made to set aside the special finding of the jury.

Defendant here cites Arkin v. Page, 287 Ill. 420, and Graham v. Page, 300 Ill., 40, to the point that proof of mere ownership of an automobile is not sufficient to establish liability of the owner for the negligent driving of it. The rule announced in those cases is immaterial on this record, there having been no motion by defendant to set aside the special finding. Voigt v. Anglo-American Provision Co., 202 Ill. 462; Brimis v. Belden Mfg. Co. 287 Ill. 11. Moreover, since two juries have found against the defendant on the fact of his identity as the driver of the automobile, we would be reluctant to hold to the contrary on the facts, even if we could consider that question under the established rules.

Judgment is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

239 I.A. 660

213 - 30068

4772

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ABE GOLDBERG,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

239 I.A. 660

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On June 19, 1923, an information was filed in the Municipal court, which averred that plaintiff in error "on the 4th day of June, 1923, did then and there unlawfully, knowingly and wilfully encourage, aid, cause, abet and connive such state of delinquency of Leo Bosch, fourteen years old, 2321 Greenview avenue, being then and there delinquent child under the age of eighteen years, contrary to the form of the statute and against the peace and dignity of the People of the State of Illinois."

There was a plea of not guilty, a waiver of jury trial by the court and a finding that defendant was guilty in the manner and form charged. Motions of defendant for a new trial and in arrest were overruled, judgment entered upon the finding, and defendant sentenced to the House of Correction for the term of one year and to pay a fine of $1,000 and costs of suit.

The information was based upon paragraphs 99 and 100 of chapter 38 of the Criminal Code, which provides that one found guilty of this crime must upon conviction thereof be punished by a fine of not more than $200 or by imprisonment in the county jail not more that one year, or by both such fine and imprisonment.

It is therefore clear that the court erred in imposing the fine of $1000, and that part of the judgment must be reversed.

Before the beginning of the trial the defendant made a

motion to quash the information and this motion was denied by the court. Paragraph 99 of the statute in question defines those acts which will constitute delinquency on the part of a child. The information in question does not state any facts constituting the delinquency of Leo Dosch. It is wholly impossible from this information to determine what was the particular delinquency in which defendant abetted or encouraged Leo Dosch. Defendant was entitled to know the nature of the offense with which he was charged. This pleading does not give that information. Informations charging this offense have hitherto been considered by this court in People v. Wallace, 185 Ill. App. 213, and People v. Kravis, 202 Ill. App. 286. The informations in those cases were held sufficient, but they are easily distinguishable from the instant case in that there was in those cases no motion by the defendants to quash.

The motion of the defendant in this case should have been granted, and for the error in denying this motion the judgment will be reversed.

REVERSED.

McSurely and Johnston, JJ., concur.

219 - 30072

ROBERT A. UIHLEIN,
Appellee,

vs.

GEORGE K. BROSCH,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

239 I.A. 660

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff sued for forcible detainer. There was a trial by the court and a finding of guilty and judgment for restitution, from which the defendant appeals.

The defendant's first contention is that the finding is not sustained by the evidence. It appears that prior to February 25, 1924, defendant was in possession under a written lease from the plaintiff, which provided that defendant should hold the premises "solely at the will of the lessor," and expressly stated that the tenancy thereby created was a tenancy at will and not for any definite period.

Although the lease by its terms required the payment of a rental of $500 a month, defendant had been paying only $250 a month.

February 25, 1924, notice was given that the tenancy would be terminated upon April 30, 1924, thereafter. The agent for these premises resided in Milwaukee, Wisconsin, and on April 24th, in reply to a letter from defendant (the question of a new lease having in the meantime been discussed) Mr. Abrams, the agent in Milwaukee, stated that the owner would not be willing to enter into a five-year lease at that time and that no lease would be sent to defendant. The letter also suggested that it would be to the advantage of defendant in the event he desired to rent the premises after May 1st, to come to Milwaukee "for the purpose of making such arrangements."

May 13, 1924, a new notice that defendant's tenancy would be terminated on July 1, 1924, was served on the defendant. The defendant testified in his own behalf that he went to Milwaukee on or about May 15, 1924, and while there saw plaintiff and his agent He said that Mr. Abrams laid plans in front of him and told him that they were going to remodel the building unless the bids were too high, but that in the meantime defendant could move his front restaurant business into the back part of the building; that they talked about a lease and Mr. Abrams offered defendant a two-year lease, but he was not satisfied; that Mr. Abrams then said: "After we get everything finished I will give you a written lease as Mr. Mihlein promised you for five years, but as long as this thing is not finished you can stay there until May 1, 1925, anyhow."

Mr. Abrams testifies, on the contrary, that defendant came to his office in response to the letter of April 24th, before May 1st; that he, Abrams, then told defendant that he would not give him a lease for any period until the matter of the rent which was in arrears should be adjusted, and that he could not do anything until this was arranged. Abrams denies that he said to defendant that he was willing to give him a two-year lease or a five-year lease, or anything that could be so construed, but on the contrary (he says) told him that he was to vacate April 30, 1924. Abrams further says that nothing was mentioned about May 1, 1925, by either one of them.

The plaintiff testifies that defendant's visit to Milwaukee was in the latter part of April, and says that at that time, just as he, plaintiff, was leaving the office, he met defendant; that they talked a couple of minutes, when he, plaintiff, got in his car and drove away; that nothing was said about the building or about the leases for it.

We think the burden of proof was on the defendant to establish the fact of the oral agreement to which he testifies, and

that it was also necessary for him to establish the fact that the agreement, if made, was entered into on or after the first day of May, as otherwise it would be invalid under the provisions of the statute of frauds. Wheeler v. Frankenthal, 76 Ill., 124; Durflinger v. Fisher, 193 Ill. App. 378; Leindecker v. Schaeffer, 194 Ill. App. 508.

The court saw the witnesses and heard them testify. In view of the fact that defendant was in arrears in the payment of his rent, his testimony is rather improbable. At any rate, he is contradicted by two witnesses, and we cannot say that the finding of the court is against the preponderance of the evidence.

The judgment is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

237 - 30090

COURTENAY BARBER,
Appellant.

vs.

HAROLD H. KING,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 660

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The appellant, who is plaintiff in the trial court, caused a judgment of confession to be entered upon two promissory notes executed by the defendant, appellee, on May 19, 1924, to the order of "Courtenay Barber, general agent." Thereafter on motion of defendant, supported by a verified petition, the judgment was vacated and an order was entered that the petition should be taken as an affidavit of merits.

The cause was submitted to a jury which returned a verdict for defendant upon which (a motion for a new trial having been overruled) the court entered judgment.

The consideration for the notes was a policy of life insurance and the gist of the defense as set up in the affidavit of merits was that the delivery of the notes to Barber was conditional and upon the agreement that these notes would be held by Barber until such time as defendant would decide whether he would accept the policy. The affidavit averred and proof for the defendant tended to show that shortly thereafter defendant notified the agent holding the notes that he would not accept the policy and requested the return of the notes, which was refused on May 21, 1924.

The plaintiff, citing Neely v. Lewis, 5 Gillman 32, and a number of similar cases, argues that the delivery of the notes

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to the payee could not have been made in escrow, but would in law be regarded as an absolute delivery. We do not regard this case and others cited as at all applicable.

Section 16 of Chapter 98 of the Negotiable Instrument Act, Smith and Hurds Ill. Rev. Statutes 1923, is controlling here. We have construed that section in Straus v. Citizen's Bank, 164 Ill. App. 420, and have followed that decision in the recent case of First National Bank of Harvey v. Trott et al., No. 29416, not yet reported. These cases hold (in conformity with what must now be regarded as settled law) that under the provisions of said section a delivery may be shown to have been conditional or for a special purpose only and not for the purpose of transferring the property in the instrument as between the immediate parties or one not a holder in due course. See 8 Corpus Juris, p. 206 and Mehlin v. Mutual Fund Life Association, 51 South Western 1063.

The defendant points out that under the law of this State delivery of a life insurance policy to the insured is not essential to its validity; that the issuance of the policy is prima facie evidence that the premium has been paid and that it becomes binding upon the company from the time it is forwarded to the agent who wrote the insurance to be delivered to the insured. Citing Ross v. Mutual Life Ins. Co., 240 Ill. 45; Devine v. Federal Life Ins. Co., 250 Ill. 203, and other cases. This we regard as immaterial since the suit is upon the notes and it is of course elementary that a note does not have validity until it is delivered.

The judgment is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

241 - 30097

GEORGE F. MOORE,
Appellee,

vs.

GEORGIA CASUALTY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

239 I.A. 660

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The defendant Company appeals from a judgment in the sum of $3,300 entered upon a verdict of the jury. The suit was filed on July 28, 1922, and the declaration (which was in assumpsit) was based upon a policy of insurance whereby defendant agreed to indemnify the insured (subject to certain conditions) for damages on account of bodily injuries accidentally suffered (while the policy was in force) by reason of the ownership, maintenance, or use of an automobile.

While the policy was in force and on February 5, 1918, plaintiff sustained a collision with another automobile belonging to the Yellow Cab Company, and in this collision one Scott, then a passenger in the Yellow cab, was injured.

Scott thereafter sued plaintiff and the Yellow Cab Company jointly, and the defendant Insurance company was notified by plaintiff to defend that suit in his behalf, which it did.

On November 1, 1919, in the suit thus brought, a judgment was entered against plaintiff and the Yellow Cab Company for the sum of $5,000.

The Yellow Cab Company prayed an appeal to the Appellate court, which was allowed and perfected, and the defendant Casualty Company, in plaintiff's behalf, prayed an appeal, which was allowed but which it did not thereafter perfect.

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On November 20, 1920, Foster C. Scott, the judgment creditor, in consideration of $2500 in hand paid, assigned his judgment to one Harold Leopold. The consideration was furnished by the Yellow Cab Company and credited to Leopold on the judgment.

Thereafter an execution against Moore was sued out and returned and garnishment proceedings instituted against him on the judgment. He was then employed by Marshall Field & Company, and through these garnishment proceedings the assignee of the judgment collected $56.33. The defendant Casualty Company paid this sum in behalf of Moore, and their adjuster, the evidence indicates, interviewed the house attorney of Marshall Field & Company, who informed him that the Company "would not stand for it," that is, having an employee's salary garnished from time to time.

The plaintiff testified (and his testimony is not contradicted) that after the judgment against plaintiff and the Cab Company was obtained a representative of the Casualty Company stated to him that the Company "wanted to buy back my policy. He stated the Georgia Casualty Company would be willing to pay probably $500 for my policy back; inasmuch as I had nothing Scott could get from me, I would be that much ahead. I told him I didn't want to do that,inasmuch as they had a judgment against me I wanted them to settle it. I took the policy out with the understanding I would be protected, and I felt it only fair the Insurance company should pay the judgment against me. He said, 'If you feel that way about it, just let it alone and we will take care of the necessary transaction.' He said, 'We will drag it along until Mr. Bloomingston gets tired and he will grab off a couple of Yellow cabs and make them pay the full amount, so just let it alone.' He told me not to give any notes or do anything at all, that the insurance people would take care of it."

Plaintiff drew a salary of about $4,000 a year, but

did not have other property to any considerable amount. He did not, however, desire to have garnishment proceedings brought against him from time to time, and after consulting with Mr. Bloomingston, who had in all these proceedings acted for the injured claimant Scott, he, Moore, went to the Stony Island Bank, at which place Bloomingston had influence, and there borrowed the money necessary to pay the balance of the judgment. He paid this money to the assignee, Leopold, who thereupon satisfied the judgment of record.

On the same day, namely, July 26, 1922, plaintiff demanded of the Casualty Company the payment to him of $2911.87, which request was not complied with. Thereupon this suit was begun with the result stated.

At the close of all the evidence there was a motion by the defendant Casualty Company for an instructed verdict in its favor, which was denied, and the defendant's first contention is that this was error on account of which a motion for a new trial should have been granted.

Condition D of the policy is as follows:

> "No action shall be brought against the Company under or by reason of this policy unless it shall be brought by and in the name of the assured for a loss defined hereunder, after final judgment has been rendered in a suit described hereunder, and within ninety days from the date of such judgment, to-wit: for loss that the assured has actually sustained by the Assured's payment in money (a) of a final judgment rendered after a trial in a suit against the assured for damages;"

This suit was not brought within ninety days from the date of the judgment rendered against plaintiff and the Yellow Cab Company. The defendant therefore contends that as a matter of law the plaintiff cannot recover. On this point the defendant cites Illinois Tunnel Co. for use, etc. v. General Accident, Fire & Life Insurance Co., 219 Ill. App. 251; Gallagher v. American Alliance Insurance Co., 220 Ill. App. 476, and other cases.

In the Illinois Tunnel Co. case a sixty day clause of limitation in a policy quite similar to that sued on was held not to have been waived by reason of the Casualty Company accepting and assuming the defense of the cause of action out of which it was claimed the liability arose. The third division of this court there expressed disapproval of the law as laid down in Sanders v. Frankfort Marine Accident and Plate Glass Co., 72 N. H. 485, and other cases following that decision. Also the court in that case states that the policy was one of indemnity rather than of insurance against direct liability, following on that point the previous case of United States Fidelity & Guaranty Co. v. Maryland Casualty Co., 182 Ill. App. 438.

Moreover, we are of the opinion that this case is easily distinguishable from the Illinois Tunnel Company case, in that sufficient facts here appear from which the jury might have found, and we will presume did find, that there had been a waiver of this provision of the contract.

The provision is in the nature of a statute of limitations, (Lynchburg Cotton Mill v. Travellers Ins. Co., 149 Fed. 954,) and acts on the part of a defendant insurance company may be held to amount to a waiver of a clause of this kind. Syracuse Lighting Co. v. Maryland Casualty Co., 226 N. Y. 25, 122 North Eastern Rep. 723.

The uncontradicted facts here appear to be that not only did the defendant company assume the defense of the action out of which it is claimed the liability arose and which, under the rule as laid down in Sanders v. Frankfort Marine Accident & Plate Glass Insurance Co., would make the defendant liable, but it also appears by the uncontradicted testimony that the defendant here while acting for Mr. Moore prayed an appeal and secured ninety days after the rendition of the judgment to settle the bill of

exceptions in the case; that thereafter the garnishment proceedings having been brought, it recognized its liability by paying the amount there found due on the judgment from the garnishee, and afterwards specifically informed plaintiff, "That it was all right. They would take care of it."

Having construed this provision of the contract in this manner and having lulled the plaintiff into security by the promises which have been recited, defendant will not now be allowed to contest its liability upon that ground.

We hold that the uncontradicted facts in the record show a waiver by defendant of the ninety day clause in the contract.

The defendant next contends that there is no liability upon the defendant Casualty Company because the policy was an indemnity contract and the assured has not, it says, "paid a bona fide loss." The same paragraph of the contract provided that no action should be brought except "for loss that the Assured has actually sustained by the Assured's payment of money, (a) of a final judgment rendered after a trial in a suit against the assured for damages." Here again the defendant relies upon the Tunnel Company case, and charges that the facts show that the alleged liability on the part of the defendant Casualty Company was attempted to be brought about by certain acts on the part of the officers of the Yellow Cab Company, Leopold, Bloomingston, and plaintiff Moore, who went through certain motions for that purpose.

The evidence does establish the fact, we think, that Leopold was chosen as the assignee of the judgment because he was a party the Yellow Cab Company and Bloomingston were willing to trust with the matter in hand; and we have no doubt the loan which plaintiff Moore obtained at the bank, was in fact given at the re-

quest of Bloomingston and by reason of the confidence which the bank reposed in him. But what of it? Bloomingston and the Yellow Cab Company had a legal right to agree that Leopold, in whom both had confidence, should become the assignee of the judgment, and Scott was willing to assign it to him. Bloomingston had a perfect legal right to request his bank to make a loan to the plaintiff Moore upon Moore's unsecured note, provided he could induce the bank to give the credit, nor can we see in these things "a down right fraud on the Casualty Company" in this transaction, as its counsel suggests. Equitably, as between Moore and the Yellow Cab Company, Moore was obligated to pay one-half of the judgment. Legally he was liable for all of it, and under the terms of the indemnity policy the defendant Casualty Company, had Moore paid the entire amount of the judgment, would have in turn been liable to Moore for the full amount.

The defendant Casualty Company did not see fit to accept this equitable responsibility. On the contrary, the uncontradicted evidence shows that its agent suggested to Mr. Moore a method by which he might evade the payment of any part of the judgment against him and compel the payment of the entire amount by the Yellow Cab Company. The method suggested was that plaintiff should wait until Bloomingston would cause a levy to be made on the Yellow Cab Company. The method was ingenious, but Bloomingston seems to have discovered what he thought was a better way. The defendant made a bad guess, and Bloomingston, we have no doubt, devised and carried through a plan by which his client was able to collect the full amount of the judgment, and the defendants were compelled to contribute their equitable proportions. Whether his motives were altruistic is not made clear by the evidence, but there was no fraud as we look at it, and all parties to the transaction were within their legal rights.

The defendants further suggest that if the Yellow Cab Company was given a release at the time of the payment of $2500 by it, this release of one joint tort feasor would release the other and that in turn the defendant Casualty Company would be released from its liability. Wallner v. Chicago Traction Co., 245 Ill. 148; Ennis v. Pullman Palace Car Co., 165 Ill. 161, and Petroyeanis v. Pirolo, 308 Ill. App. 310, are cited to this point. The point is undoubtedly good, as cases cited show, but the record does not contain evidence to support the supposition on which it is based.

The judgment is affirmed.

AFFIRMED.

McSurely, and Johnston, JJ., concur.

256 - 30109

JOHN WOLF,
Appellee,

vs.

JOSEPH HERZOG and
I. HERZOG,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 661

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The defendants appeal from a judgment for $533.32 entered upon the finding of the court.

The statement of claim which was filed on January 3, 1923, alleged that on September 15, 1919, plaintiff requested the defendants to purchase a draft for him for 20,000 kronen; that he paid to them $400 in United States currency for the purchase of the draft, and defendants agreed to procure the same, payable at a bank at Budapest, Austria-Hungary. Further that defendants gave plaintiff a draft in the sum of 20,000 kronen, dated September 18, 1919, payable to the plaintiff through the Wiener Bank Verein, Budapest, being a draft of the Guaranty Trust Company of New York; that the plaintiff at various times subsequent to September 18, 1919, presented the draft at the Wiener Bank Verein, Budapest, which returned the same to the plaintiff as there was not sufficient funds on deposit there to pay it.

The statement alleged that it was the duty of the defendants to procure for the plaintiff by reason of the agreement entered into a good and proper draft which they negligently failed to do; that plaintiff had often requested the defendants to return the sum of $400 paid to them for the draft, which they

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had refused to do.

The affidavit of merits denied that defendants were doing business under the name of I. Herzog & Company and denied that plaintiff had at any time any transactions with them individually or as a company, or that they were liable individually or as a company.

It alleged that plaintiff requested I. Herzog & Company to purchase for him a draft for 20,000 kronen payable at the bank named and gave to them $400 for the purchase of the draft; that they delivered to the bank a draft executed by the Guaranty Trust Company of New York for the sum of 20,000 kronen, dated September 18, 1919, payable to the order of plaintiff through the Wiener Bank Verein at Budapest, Hungary. It denied that plaintiff presented the draft to the bank at that place, and denied that the bank returned the draft for the reason that there was not sufficient funds on deposit to pay it, and denied that there was not sufficient funds to pay it.

Further defendants denied that it was their duty to procure for defendant any other or different draft, and denied that they were negligent in procuring this particular draft, and denied that the same was not a good and proper draft or that at any time any proper request or demand for the moneys paid out in the purchase of the draft was made or that the plaintiff gave them notice of his alleged claim.

The affidavit of merits further alleged that if any cause of action existed in favor of the plaintiff for the alleged non-payment of the draft said cause of action was against the Guaranty Trust Company of New York and not against the defendants or either of them.

The plaintiff contends that as there was no motion for a new trial, defendants are precluded from arguing the sufficiency

of the evidence to support the judgment. That rule is not applicable where, as here, the trial is by the court without a jury. Crandall v. Kirk, 185 Ill. App. 460; Spencer Turner Co. v. Schuill, 195 Ill. App. 432.

The defendants, however, contend that the court erred in sustaining objections to evidence offered in its behalf. In particular it complains that a witness, one Gottlieb, who testified that he was in Budapest in November and December, 1923, and knew the custom there regarding the cashing of drafts without identification of the owner other than his passport, was not permitted to testify to that fact. The offer did not show that the custom was ancient, certain, uniform or reasonable, and was therefore properly excluded. Bissell v. Ryan, 33 Ill. 566.

Certain letters from the Guaranty Trust Co. of New York and the bank in Budapest were offered in evidence tending to show that sufficient funds were upon deposit for the payment of the draft were excluded. These letters were merely ex parte statements of parties who were not under oath and were therefore properly excluded. Capen v. DeSteiger, 105 Ill. 185; I. C. R. R. Co. v. Cobb, 72 Ill. 148.

At the close of the trial the attorney for defendant stated: "I offer to show by this officer of the Guaranty Trust Company of New York, that the Guaranty Trust Company did have sufficient Kronen to their credit in the Wiener Bank Verein at Budapest, on the date when Mr. Wolf claims to have presented these drafts there." An objection to this offer was sustained.

The record fails to disclose that any officer of the bank was present in court at this time or any person sworn as a witness or asked any question and the offer was therefore clearly insufficient. Chicago City Ry. Co. v. Carroll, 206 Ill. 318; Martin v. Hertz, 224 Ill. 84. We think the court did not exclude any material evidence which was admissible and there is no error in

this respect.

The defendants contend that there is a variance between the evidence and the statement of claim, but as the action was a fourth class case in the Municipal Court, the case was whatever the evidence made it. Paris Flouring Co. v. Imperial Milling Co., 161 Ill. App. 215, and Fisher v. Tauber, 174 Ill. App. 436.

The uncontradicted evidence showed that the defendants were in the business of buying and selling foreign exchange; that the plaintiff applied for a draft stating that he was about to make a trip to Hungary for the purpose of bringing his family home; that defendants without any suggestion from him furnished the draft; that he presented it to the bank in Hungary together with his passports, identifying him and payment was there refused on account of insufficient funds. Under these circumstances we think defendants were clearly liable and as to matters on which there was an issue of fact the court who saw the witnesses and heard them testify was best able to judge the weight of the testimony.

The judgment is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

265 - 30118

JOHN FLUGER,
Appellee,

vs.

ALICE WERNAME,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

239 I.A. 661

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree which directed her to permit the complainant, who is her tenant, to repair and keep in repair an iron water pipe supplying water to complainant's kitchen in an apartment occupied by him. The decree also restrains defendant from interfering with the flow of water through said pipe to the kitchen sink in the apartment of complainant. It directs that the complainant, according to an offer made by him, shall furnish the necessary labor and gasoline for the operation of a pump with which the water pipe leading to complainant's kitchen is connected. The decree further provides that in default of permission to the complainant to make such repairs, the defendant should proceed at once to make such repairs as might be necessary "to conduct water into the kitchen sink in the apartment occupied by complainant, as it was conducted when the lease in question and in evidence was made, and thereafter refrain and desist from interfering with the flow of water into the kitchen of complainant's apartment."

The cause was heard by the chancellor upon exceptions to the report of a master in chancery to whom the cause had been referred, and the decree entered is in conformity with and approved the report of the master.

The material facts are not, we think, in dispute. The

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complainant is the tenant of defendant, holding possession of certain premises demised to him by a lease in writing made on the 21st day of June, 1924. The demised land is a farm, on which is a building consisting of two apartments, one of which is occupied by the defendant and the other by the complainant. An oral agreement to lease these premises was made between the parties on or about March 1, 1924, at which time the defendant was a minor. It was agreed that the oral lease should remain in force until such time as the defendant should arrive at her majority, and that she would thereupon execute a written lease in accordance with the terms of the agreement then made and in pursuance of that oral agreement, the written lease of June, 1924, was executed. On or about March 1, 1924, the complainant went into possession of the demised premises, and at that time the water service for the demised premises was obtained from a well situated on that portion of the premises reserved for the use of the defendant, and the water therefrom was distributed through pipes running into both of the apartments on said premises, the water being pumped by an engine into a tank on the roof of the building, from whence it was distributed to the two apartments.

The written lease contains this provision: "It is further agreed that the party of the second part shall be entitled to water in sufficient quantity for ordinary family use from the well on the part of said premises now occupied by said party of the first part."

After the execution of the lease, as prior thereto, water was furnished to the complainant from the well in the manner above set forth, through pipes connected with the tank in the portion of the building occupied by the defendant, and the tank was filled from water pumped from the well, the pump being operated by

a gasoline engine.

On August 10, 1924, the defendant, without notice to the complainant, shut off this water service and discontinued all water service to the premises occupied by the complainant, and since that time the complainant has found it necessary to carry water from the well into his apartment on that portion of the premises which is reserved for him.

The bill alleges, and the master finds, that complainant repeatedly offered to keep the pipes supplying the water in good repair and furnish gasoline and power for the portion of the engine used for pumping the water, and also offered to furnish all labor necessary in connection with operating the engine and pump at his own expense, but that the defendant refused to furnish the complainant with water in this manner.

The defendant contends that under the terms of the written lease she was not required to furnish water to the complainant through these pipes, and takes the position that she fully complied with the covenants of the lease by permitting the complainant to carry the necessary water from the well to his own premises.

The defendant argues first that there was no valid contract in relation to the use of the water until the written lease was executed, because the prior oral agreement being made in the fall of 1923, was an attempted verbal lease for three years from March 1, 1924, was invalid as being within section 2 of the Statute of Frauds, and that notwithstanding possession was taken thereunder, amounted only to a verbal lease from month to month by operation of law. It is so held in Molitor v. C. H. Thom Van Co., 118 Ill. App. 393, based on Warner v. Hale, 65 Ill. 395, Creighton v. Sanders, 89 Ill. 543. While this is undoubtedly the

law, we regard the fact as wholly immaterial since the bill is based upon the agreement to furnish water contained in the written lease, the validity of which is not disputed. Evidence as to complainant's possession under the oral lease and the condition of the premises with reference to the manner in which water was supplied to his apartment up to the time the written lease was made, is important only as showing the actual situation with reference to which that lease was entered into.

The further point made by the defendant that the oral lease was invalid by reason of her minority is also unimportant for the same reason and is without any force in view of the fact that it is not claimed that she disaffirmed the lease upon attaining her majority.

The defendant next contends that the privilege of complainant with reference to the use of the water from the tank through the pipes was not an easement, but a mere license, revocable at the will of the defendant. Morse v. Lorenz, 262 Ill. 115; Finch v. Theiss, 267 Ill. 68, are cited to this point, but are clearly distinguishable, since the rights of the parties in this case, unlike those, are determined by the provisions of a written lease. No question, therefore, here arises under the Statute of Frauds.

The defendant further argues that oral evidence was not admissible for the purpose of showing the construction which the parties thereto placed upon this provision of the lease, because, it is said, there was no ambiguity in the provision. It is, however, not necessary to discuss the question of whether any doubt or ambiguity existed in that respect. The evidence was admissible under another well settled general rule, namely, that as between landlord and tenant evidence is always admissible to show the condition of the premises leased at the particular time the same were demised.

Black v. Knox, 114 Ill. App. 435, is clear on this point. The opinion in that case quotes with approval from High on Injunctions, sec. 1150, 7th edition, as follows: "As between landlord and tenant courts of equity have protected and enjoined a landlord from interfering with the premises on the ground that the tenant was entitled to use, occupy and operate the premises in the manner and condition and with the appurtenances existing at the time the lease was made." It is not necessary to repeat what was said in that opinion or to review the long line of authorities cited which sustain this proposition. A mandatory injunction was the proper remedy in the case set up in the bill and established by the evidence. Brown v. Glesing, 130 Ind. 167; Hunt v. Bain, 161 Ill. 377-9. It may be that the trial court proceeded on an erroneous theory and that some evidence was admitted that should have been excluded; but the theory of the trial court is immaterial, and there is ample evidence to sustain the decree. It is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

274 - 30127

MICHAEL WHALEN,
Appellee,

vs.

THE CITY OF CHICAGO, a Municipal Corporation, WILLIAM E. DEVER, Mayor, MORGAN COLLINS, General Superintendent of Police, PATRICK McCAULEY, Captain of Police of the Woodlawn Avenue Station, and JOHN COYNE,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

239 I.A. 661

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

The City of Chicago, its Mayor, Chief of Police and other officials of the law enforcing department of its government appeal from a decree by which they were "permanently restrained and enjoined from picketing the store of the complainant and following the customers of the complainant and from standing directly in the entrance of said store or in front of said store for long spaces of time; and enjoined from in any way unlawfully or wrongfully interfering with the business of the complainant and hindering him in the operation thereof."

The complainant has not appeared in this court in support of the decree and under our rule we will assume that the statement of facts by defendants is correct.

The cause was heard by the chancellor upon the bill of complaint, the joint and several answers of the defendants and the testimony taken in court.

The evidence tends to show that the acts complained of were certain visits of the police of the City of Chicago made to complainant's place of business after October 1, 1924. In the

previous year this place was run by a man named "Scottie" Wright. He had been charged with violations of the liquor laws and his license to conduct a soft drink parlor on the premises had been revoked. He remained, however, about the place in such a way as to give the impression that he was still running it. The place was not of the best repute and complaints of sales of liquor had been made against it. At one time there was a shooting and a man killed near this place.

On May 20, 1924, one Raskey was arrested while delivering a truck load of beer to the place, and the police had been instructed to watch and see if intoxicating liquor was being sold there.

There were rooms back of the front store and on October 25, 1925, the police discovered that in one of these rooms which was locked were five men playing cards and drinking from glasses which were emptied while the police were calling for the opening of the door. There was an odor of liquor there at that time and furniture that had been in use when the premises had theretofore been occupied as a saloon remained in the rear rooms.

The complainant alleged that the business conducted there was that of a cigar store. He testified that he paid $300 for the good will of the business and fixtures and that his business was worth $10,000. He admitted that in the six weeks previous to the hearing of the cause, he had expended only $142.15 for stock in trade, tobacco and cigars and that he could not make a profit of $300 per month on that amount of stock. The rent was $300 monthly and complainant paid a clerk $27 a week and a porter $15 a week to assist in running the business.

That the general rule of law is that a court of equity will not enjoin the exercise of police power given by law to the officers of a municipal corporation, or interfere with the public duties of the departments of government or restrain proceedings

in a criminal matter has been the settled law of this state since the decision in Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372. The rules of law as there set forth have been since followed in a continuous line of decisions by the Appellate and Supreme Courts of this State. Burton v. Aetna Life Ins. Co., 229 Ill. App. 517; Abel v. Flesher, 296 Ill. 604. In the absence of a brief by the complainant, we will not discuss the cases further than to say that courts of equity are and should be reluctant to interfere with the law enforcing department of the government.

The decree is reversed and the cause remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and Johnston, JJ., concur.

283 - 30136

MRS. RUBY WAGNER,
Appellee,

vs.

M. L. NILSEN, trading as
Lincoln Auto Service,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 661

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is appellee, brought a suit in replevin to secure possession of an automobile. The defendant refused to deliver the auto to the bailiff who served the writ and she thereupon declared in trover for the value of it, and upon the trial by the court secured a finding of guilty and judgment thereon for $600.

The evidence of the plaintiff tended to show the purchase of the automobile on July 15, 1924, and that it was as plaintiff says "stolen" on October 20th thereafter. If there was any evidence tending to show the purchase price of the automobile, the same does not appear in the abstract.

Plaintiff found the automobile at defendant's place of business and pretending that she wished to buy asked the defendant at what price it might be purchased. He asked her $600 for it.

The evidence further shows that there was a mortgage on the automobile upon which there was due a balance of $350, and that this mortgage was purchased by the defendant who attempted to foreclose.

The defendant says that the court erred in finding the value of the automobile to be $600 and in entering judgment for

that amount. The only evidence before us tending to show the value of the automobile is that of plaintiff to the effect that when she proposed to purchase it defendant asked $600. Therefore this contention must be sustained. The offer by a vender to sell second hand goods in a given market for a given price, which offer is unaccepted, is not sufficient evidence upon which to base a finding of value.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McCurely and Johnston, JJ., concur.

296 - 30149

4760

ELIZABETH G. PEIL,
Appellee,

vs.

AUTO CAPE TOP COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

239 I.A. 662

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff sued in assumpsit on a promissory note purporting to have been made by the defendant on March 31, 1920, to the order of plaintiff for $2,236, payable on demand with interest at six per cent. Her declaration was a special count on the note and the common counts consolidated. The defendant pleaded the general issue and filed a verified special plea which set up that one A. B. Leighler, its treasurer, who executed the note in question, was without authority to bind the corporation or sign its name to the note.

The cause was submitted to the court for trial and at the conclusion of the evidence the court, overruling a motion of defendant for a finding in its favor, found the issues for the plaintiff and entered judgment in her favor for $2,800.38.

The errors assigned and argued are that the finding of the court is against the weight of the evidence and that under the evidence the defendant is not liable, and it was therefore error to enter judgment against it.

The evidence tends to show that the defendant corporation at the time and prior to the execution of the note was engaged in the business of repairing automobiles. One Herron from the time of the organization of the corporation was its president, and one J. B. Zimmers during the same time its vice-president.

Leo A. Peil, who is the husband of plaintiff, was and is a stockholder, director and general manager of the corporation. Leo A. Peil, Herrow and Zimmers were also stockholders of the corporation, and with M. F. Peil, the son of Leo A. Peil, constituted the board of directors. Bieghler has been the treasurer of the corporation from the time of its organization.

January 23, 1920, a resolution was passed by the board of directors that a salary to the amount of $2,000 should be credited to the account of Leo A. Peil "for services as general manager of the corporation for the last year," and that the sum of $1,000 should be credited to each of the accounts of Herrow and Zimmers.

The evidence tends to show that the purpose of this resolution was to provide for the equitable distribution of a surplus then held by the corporation. The evidence also tends to show that at this meeting Mr. Peil suggested that he did not need the money at that time, and that he would take the note of the corporation for the amount coming to him. Thereafter the sums allotted to Herrow and Zimmers by the resolution were paid to them in cash, and at the direction of Leo A. Peil, Biegler, the treasurer, wrote out, and signed and delivered the note, which is here sued on, in settlement of the amount due by the resolution to Leo A. Peil. The evidence further tends to show that all notes which had been issued by the corporation theretofere had been executed by Bieghler, usually however, upon the direction of some officer of the defendant company.

Mr. Bieghler testified that "ordinarily in the original loan, we would all get together in an informal way. We would all get together, Mr. Peil, Mr. Herrow and Mr. Zimmer and they would call me into the conference and we would look over the situation about the bills that we owed and about how we wanted to develop the business and beside possibly to make a loan. That was

arranged with the bank, and I went down to the bank and signed the note. They would direct me to go down to the bank and make the loan and sign the note. That happened in each case where there was an original loan. That happened possibly once or twice, because I think the original loan ran for a period of years. When the note became due I would go to the bank and arrange for the extension."

That in the absence of authority conferred the treasurer of a trading corporation does not have power to execute and deliver negotiable instruments, may be conceded to be the law. Such authority, however, may be conferred upon the treasurer by a by-law or by resolution of the board of directors, or it may be implied from the course of business theretofore followed. Fletcher's Cyclopedia of Corporations, Vol. 3, p. 3364; Vol. 7, Ruling Case Law, p. 455; McDonald v. Chisholm, 131 Ill. 273; Snyder v. Bailey, 165 Ill. 447; Atwater v. American Exchange Nat. Bank, 182 Ill. 605. Even where in the first instance authority to make and issue negotiable paper is wanting, the act of the treasurer in so doing may be ratified by the corporation in which case it will become binding as the obligation of the corporation. Louisville Ry. Co. v. Carson, 151 Ill. 444; Wolf Co. v. Bank of Commerce, 107 Ill. App. 38.

There is undisputed evidence tending to show that after the execution and delivery of the note here sued on, the corporation recognized its validity by paying interest thereon, and we are therefore of the opinion that even if it be conceded that authority in the treasurer was lacking in the first instance, the execution and delivery of the note has been ratified by the corporation. We are further of the opinion that under the evidence the court was justified in finding that the authority in the first instance was ample and sufficient to bind the defendant.

Judgment is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

311 - 30164

HORACE DELOS BURDICK,
Appellee,

vs.

FREDERICK H. BARTLETT,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

239 I.A. 662.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is brought by the defendant from a judgment entered in favor of the plaintiff in the sum of $4116.90 upon the finding of the court.

The basis of the suit was a demand for the return of the consideration given by the executor's testatrix, Elizabeth Burdick, for a contract made on March 4, 1918, whereby she agreed to buy and defendant to sell certain real estate in the city of Chicago.

The contract witnesses among other things that the purchase price of the real estate was $4,360; that $1700 of this amount should be paid by conveying to the vendor two certain lots described, and that said sum should be credited on the purchase price, $266 in cash, receipt of which was acknowledged, and the balance of $2394 to be paid in monthly instalments of $25 or more on the 10th day of each month and every month thereafter, commencing April 10, 1918.

The contract also provided, "And in case of the failure of the said purchaser to make either of the payments or any part thereof, or perform any of the covenants on purchaser's part hereby made and entered into, or to keep and observe all the conditions, covenants and restrictions hereinabove set forth, this contract shall at the option of the vendor be forfeited and determined, and

the purchaser shall forfeit all payments made on this contract, and such payments shall be retained by the said vendor in full satisfaction and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of the premises aforesaid."

Another provision of the contract was to the effect that, "The vendor hereby agrees to make the following improvements, except where same are already in, without cost to purchaser: Sewer and water pipes will be laid in street with service stubs to parkways, cement sidewalks of city regulations to be built and tree planted in front of each lot; the said improvements to be made as soon as city permits are issued and labor is obtainable and weather conditions favorable to the construction work, but in no case will work be commenced prior to the summer of 1917."

There is practically no dispute as to the facts. Mrs. Burdick conveyed the two lots to the defendant as agreed and made all payments promptly until June 19, 1920, at which time she asked that she might be excused from making the payment then due, and in September, 1920, she requested a further extension until the holidays of that year. Both these requests were granted by the defendant. The greater part of the deficit thus created was paid by her in the following January, and she then promised to pay up the balance shortly. Repeating this promise in April and in May, 1921. On May 10, 1921, she paid up in full the amount then due upon her contract. At about this time she again made application for an extension of the time within which she might make payments, and was again granted an extension of time until the holidays of 1921. She paid the interest due on July 11, 1921, and made no further payments.

The evidence indicates that Mrs. Burdick had on several occasions prior to this time made inquiry and requests as to the

performance of defendant's agreement with reference to the making of improvements, and that at each time she was informed that the city would not issue permits for the work to be done and that since these could not be obtained defendant was unable to make the improvements.

August 8, 1921, Mrs. Burdick caused a written notice to be served upon defendant, declaring a rescission of the contract because of defendant's failure to put in these improvements, and demanded a return of all moneys paid by her under the contract.

August 7, 1921, defendant wrote the attorney for Mrs. Burdick, expressing a desire to discuss the matter with him and suggesting that it seemed that there should be no difficulty in arranging an amicable understanding.

August 12, 1921, the attorney wrote defendant that after an interview with defendant he had taken the matter up with Mrs. Burdick and that she still insisted upon the rescission of the contract and the repayment of the money to her as stated in her notice of August 8, 1921.

August 15, 1921, defendant wrote Mrs. Burdick's attorney, reciting the correspondence and stating:

> "I have considered this matter, and in view of all the circumstances I do not feel disposed to relieve Mrs. Burdick from her contract and repay to her the money she has paid in, and this is to notify you that I do not concur in this purported rescission or recognize its validity in any way. On the contrary, this contract must be carried out according to its terms, and unless some disposition is immediately shown to proceed in this matter I shall take such steps as I deem necessary for my protection under the contract. You are hereby further notified that nothing herein contained is to be construed in any way as a waiver by me of any rights I now have in said contract by reason of the defaults of Mrs. Burdick."

The defendant offered evidence tending to show that on September 29, 1921, he notified Mrs. Burdick that "unless you make payment of the amount due upon said contract within five days from date hereof, the party of the first part will declare said contract

forfeited and determined."

Further payments not being made, the defendant on October 7, 1921, served a notice reciting the contract and the non-payment by Mrs. Burdick of the sums thereunder, the previous notice, and concluding, "the party of the first part hereby declares said contract forfeited and determined, and does hereby retain as liquidated damages all payments made by the party of the second part and does hereby demand immediate possession of said premises."

In October, 1922, defendant resold one of the lots covered by his contract with Mrs. Burdick, and in April, 1923, sold the other lot; the last sale being cancelled in May, 1924, and the lot being afterwards resold by him.

The evidence shows Mrs. Burdick had paid defendant in cash for principal, interest, assessments and taxes which defendant had advanced, a total sum of $1618.02, and in addition thereto had conveyed to defendant the two lots owned by her at the agreed price of $1700.

As the undisputed evidence shows that defendant has now disabled himself from a performance of his contract by conveying to a third party the real estate which under the terms of the contract was to have been conveyed to Mrs. Burdick, it is apparent that any attempt to enforce this forfeiture, as against her, would result in a very grave injustice.

The defendant urges in its behalf certain propositions of law to the effect that a party in default under the terms of a contract for the purchase of real estate cannot sue for and recover instalments of purchase price paid upon such contract; that in order to justify rescission of a contract the failure of the opposite party must render the object of the contract unattainable; that a breach of independant covenants will not authorize rescission; that

one who with knowledge of facts which would justify a rescission thereafter seeks and obtains indulgence in respect to the manner of performance of her obligations, thereby waives her right of rescission; that the making of payments by plaintiff's testatrix over a period of years without insisting upon a performance of defendant's covenant relating to installation of improvements, imposed upon her the duty of making a demand upon defendant for the installation of the same and granting defendant thereafter a reasonable time to make such installation before a rescission of the contract by her would be justified; that a tender of performance by plaintiff's testatrix was necessary before she could rescind; that an attempted rescission, if unauthorized, is of no effect; that a rescission of a contract annihilates the same and no rights can be claimed thereunder by either party, and the status quo is to be restored. All these propositions being conceded are not, we think, controlling under the facts which appear in this case.

The controlling facts are, first, that the defendant has resold the lots which, under the terms of his contract, he agreed to convey to Mrs. Burdick, and has thereby disabled himself absolutely from performing his contract; second, that the attempted forfeiture of the contract on his part on October 7, 1921, was not justified, because the undisputed evidence shows that an extension of time until the following holidays, (which must be construed to mean at least to December 25, 1921,) had been granted.

Under these circumstances we do not deem it necessary to decide whether under the evidence Mrs. Burdick was justified in her attempt to forfeit the contract on August 8th. It may be conceded that this attempt was not justified, but when the defendant proceeded to convey the property forming the subject matter of the contract, he became liable to return the consideration which he

had received, his attempted rescission being ineffectual.

In Hurd v. Denny, 16 Ill. 492, plaintiff sued defendant for money which plaintiff had paid on land sold to him by the defendant, it being admitted that defendant had sold and conveyed the land to another.

The court pointed out that the suit was not in the nature of a suit of specific performance; that plaintiff was therefore entitled to recover back what he had paid without performance of conditions precedent. It was further held on authorities cited that the plaintiff was entitled to recover not only the amount paid but interest thereon, and the same rule has been applied in Bitzer v. Orban, 88 Ill. 130. In this case, over objection by defendant, the court allowed interest at the rate of five per cent from January 1st, 1924. Technically, the interest should have been computed from the respective dates upon which payments were made, but computed by that method it would have amounted to a larger sum. Defendant has therefore no real cause for complaint in that respect.

Defendant also argues there was a variance between the proof and the declaration as to the precise date on which the lots were reconveyed by him. This point was not, however, raised in the trial court and will therefore be considered as waived.

The judgment is affirmed.

AFFIRMED.

McCurdy and Johnston, JJ., concur.

324 - 30177

HARRY A. SALZMAN,
Appellee,

vs.

COMMUNITY STATE BANK,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 662

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff brought a suit in assumpsit filing the common counts to which was attached an affidavit of merits. Defendant filed certain pleas with an affidavit which was stricken and thereafter an amended affidavit filed. Upon motion of the plaintiff this amended affidavit of the defendant was stricken from the files for insufficiency and the pleas of the defendant stricken for want of an affidavit of merits. The court found from the affidavit of plaintiff's claim that there was due from the defendant to the plaintiff $502.50, for which amount judgment was entered.

The defendant contends that the affidavit of claim attached to the declaration was insufficient under the provisions of section 55 of the Practice Act, chapter 110, Ill. Revised Statutes, and therefore it was error to strike the affidavit of merits because no affidavit of merits was in fact necessary.

The affidavit of claim has not been abstracted and this court does not look to the record in order to reverse.

However, the affidavit of claim is presented in defendant's brief, and assuming this affidavit to be correct, it is , we think, sufficient. It is as follows: "That the demand of the plaintiff in the above entitled cause is: Money had and received by

the defendant for the use of the plaintiff, and that there is due from the defendant after allowing the defendant all the just credits, deductions and set-offs, the sum of five hundred two dollars and fifty cents ($502.50.)"

The defendant contends that the affidavit is defective in that it fails to state that the amount is due from the defendant to the plaintiff. We think the pleader who drew the affidavit might well have included this statement. Nevertheless, we are also of the opinion that this fact must by necessary inference be deduced from the statement contained in the affidavit that the money had and received by the defendant was for the use of the plaintiff.

The defendant further argues that the court erred in refusing leave to defendant to file a second amended affidavit of merits, but the abstract also fails to present this question for our consideration. The controlling question in the case therefore is whether the first amended affidavit presented a good and valid defense.

It appears therefrom that on December 27, 1922, the plaintiff was a depositor at defendant bank and indebted to it on a loan, to secure which he had deposited a certain bond No. D-5243 of Morris & Company with the interest coupons thereto attached; that for the purpose of paying this loan, plaintiff offered this bond for sale to the defendant bank and asked that out of the moneys realized from the sale his obligation should be discharged and the balance, if any, credited to plaintiff's account; that the plaintiff represented that he had purchased the bond for value and was the legal and equitable holder and owner of it and duly authorized to sell it; that relying on these statements, the defendant purchased the bond for $515.81 and applied the proceeds thereof in discharge and satisfaction of the loan and credited the balance to plaintiff's account; that thereafter on March 1, 1924, the defend-

ant presented one of the coupons attached to the bond which then became due at the Continental and Commercial National Bank, which was the designated place of payment for the coupon; that this bank refused to pay the same for the reason that the bond was not the property of the plaintiff and that he paid no value for the same and that he was not the legal owner and holder thereof and was not authorized to sell or dispose of it; that the said Continental and Commercial National Bank then notified the defendant that it had in its possession an affidavit by one Ada Sempill alleging that the said bond was stolen from her deceased husband who was associated with the plaintiff in an office and that plaintiff was not the bona fide legal holder and owner of the bond for value and that said notice was given to the defendant while it was still in possession of funds belonging to the plaintiff.

The amended affidavit further stated that upon the refusal to pay this coupon defendant immediately notified plaintiff and demanded that plaintiff defend his title to said bond, which plaintiff refused to do; that immediately thereafter defendant offered to return to the plaintiff the said bond and interest coupons thereto attached and demanded the return of the consideration paid therefor, which plaintiff refused. Whereupon, defendant notified the plaintiff that it would charge his account with the amount paid for the bond, $515.81, plus interest thereon and would hold the bond and interest coupons subject to his order; that on April 9, 1924, defendant proceeded to do this, and that there then remained a deficiency due and owing to the defendant in the sum of $32.75.

The pleas to which this affidavit of merits was attached were those of non-assumpsit and payment. Even if it be conceded that evidence of the matters set up in the affidavit would have been admissible under these pleas, we do not think the same would constitute a meritorious defense.

The bare fact that a third party notified the bank at

which the coupons were payable that plaintiff was not at the time he sold the bond the true owner of it, would not, in the absence of an allegation that this was true as a matter of fact or an adjudication to that effect give defendant a right to rescind arbitrarily.

The amended affidavit of merits did not state a defense and was properly stricken.

The judgment is affirmed.

AFFIRMED.

McCurely and Johnston, JJ., concur.

339 - 30192

JACQUELINE SCOTT,
Appellant,

vs.

NORTH SHORE HOTEL COMPANY OF EVANSTON,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

239 I.A. 662

Certiorari denied

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This was an action on the case for personal injuries. There was a trial by jury, and at the conclusion of all the evidence, the court directed a verdict for defendant on which judgment was entered.

The defendant filed a special plea which set up that the plaintiff, her employer, and defendant, were operating under the Workmen's Compensation Act of Illinois and that the right of action, if any, was therefore in the employer.

The controlling question in the case is whether there was any evidence from which the jury could reasonably find for the plaintiff on this issue raised by the special plea.

There is practically no dispute as to the facts. There was evidence tending to show that plaintiff was injured on September 22, 1923, while riding in a passenger elevator of the defendant, operated by defendant's servant.

The evidence further tends to show that plaintiff at this time was employed by the Betty Wales Shop to work as a model in the sale of dresses and her employer, as well as the defendant hotel, elected to pay compensation under the law in question.

The Betty Wales Shop has three establishments. Two of these are in the City of Chicago, one at 67 East Madison street and the other at Sheridan road and Wilson avenue. The third shop

is located at the Orrington Hotel in the City of Evanston, which is directly north of Chicago.

Plaintiff began work for the Betty Wales Shop on Saturday, September 15, 1923. She worked at the Madison street shop during the day, and during two nights of each week, she worked at the Wilson avenue and Sheridan road shop. While working in the day time the hours of her employment were from nine in the morning until five p. m. When working in the evening she continued her work from her arrival at the shop until ten p. m.

Mr. Furcht was the manager of all the Betty Wales shops. Plaintiff's forelady was a Mrs. Lyons, now Mrs. Gratz.

On the evening of the accident the new shop in Evanston was to be opened and the plaintiff, Mrs. Scott, at the direction of Furcht went there on that evening to perform her usual services with other young ladies who were also employed. The other ladies went together and in a conveyance provided by the Betty Wales shops.

Plaintiff, however, went from Chicago by bus as far as the bus went and took a cab the rest of the way. She went from the Madison street shop to the Wilson Avenue shop, borrowed some money from a Miss Ray, did some shopping and then proceeded on her journey to Evanston.

Plaintiff knew before she left Chicago her employer had no shop at defendant North Shore Hotel, and she was told by the manager of the Betty Wales Shops that she, plaintiff, would take dinner at the North Shore Hotel on this evening, together with the other ladies who were working as models, of whom there were about fifteen altogether.

Plaintiff reached the Orrington Hotel in time to go with the other girls to the North Shore Hotel. She found the other ladies and her forelady at the Orrington, and there plaintiff dressed in a room with three of the other ladies similarly employed. They went together from the Orrington to the North Shore in two or three

taxis, and plaintiff says that they were terribly crowded. The arrangements for the dinner at the North Shore were made by Mrs. Gratz and she was in charge of the party.

The dining room was on the ground floor. The ladies and Mrs. Gratz ate dinner together there and the Betty Wales Shops paid for the dinner. They then went to the sixth floor of the hotel for their wraps and when they reached that floor found two maids waiting and Miss Sparkman, another lady in charge of one of the shops was there in charge of these matters. Taking their wraps, they returned by the elevator which on the way down suddenly dropped two or three feet, and this dropping of the elevator was the direct cause of the injuries, for which the plaintiff sues. At that time plaintiff uttered a cry of distress and was ordered by Mrs. Gratz to keep quiet. The party thereafter returned to the Orrington Hotel in conveyances provided by the Betty Wales Shops and plaintiff performed her services there as a model until the close of the work that evening.

These being the material facts, the controlling question in the case is whether there was any evidence from which the jury could reasonably find that the accident did not arise out of and in the course of plaintiff's employment. Ordinarily this would be a question of fact, but the evidence here being practically undisputed, we think it becomes necessary to decide the question as a matter of law. It would serve no useful purpose to review in detail the numerous decisions of the courts of this state and other states as to when an accident may be said to arise out of and in the course of an employment. The conclusion of all these cases seems to be that it is difficult, if not impossible, to lay down any general rule covering the matter, and that each case must be controlled by the particular facts which appear.

The Compensation Act does not make the employer an insurer of the safety of the employee during the term of his employment.

The accidents to which its provisions are applicable must arise out of and in the course of the employment, and it has been held that the use of the co-ordinate conjunction "and" instead of the disjunctive "or" has considerable significance. As was said in Mueller Construction Co. v. Industrial Board, 283 Ill. 148: "The words 'arising out of' refer to the origin or cause of the accident and are descriptive of its character, while the words 'in the course of' refer to the time, place and circumstances under which the accident takes place." Fitzgerald v. Clarke & Sons, 1 B. W. C.C. 197; Dietzen Co. v. Industrial Board, 279 Ill. 11. It may be conceded to be the general rule that accidents which occur during the time taken by an employee for rest when he is not engaged in his work, nor on the premises of the employer, nor subject to the employer's direction or control, do not arise out of the employment or in the course of it. Pearce v. Industrial Commission, 299 Ill. 161; Danville Ry. Co. v. Industrial Commission, 307 Ill. 142; Beards v. Industrial Commission, 310 Ill. 64.

But while this is the general rule, particular circumstances, it seems, may in such class of cases impose a liability as in Porter v. Industrial Commission, 301 Ill. 76, where the employer was held liable for an injury sustained by a traveling salesman, who, arriving in the city, proceeded to his own home for dinner on the way to the factory and was struck by a street car, or as in Steel Sales Corporation v. Industrial Commission, 293 Ill. 435, where the employer was held liable for an accidental burning which occurred while the employee was in a toilet room ordinarily used by the employee, or as in Re Sundine, 218 Mass. 1, where the employer was held liable for an accident to an employee sustained while she was on the stairs, not in the control of the employer, but which afforded the only means of going to and from her lunch. Instructive cases will be found in a note to this last named case in L. R. A. 1916,A 318.

The Illinois cases are reviewed in Schweiss v. Industrial Commission, 292 Ill. 90, where following the McNicol case, 215 Mass. 497 the Court says: "It (the injury) arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the condition under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment."

The Workmen's Compensation Act is legislation along the line of social justice, and the theory upon which it is based is that irrespective of technical rules of the common law, which have heretofore obtained, a given industry should bear at least in proper proportion the loss and damage which employees may sustain by reason of personal injuries sustained while engaged in beneficial service. That service, of course, cannot be given without the consent of the employer, either express or implied. In the ordinary case and in an employment, the nature of which is such that an employee during the rest hour is wholly disconnected from the order or direction of the employer and is in no wise subject to his direction, but on the contrary is free to go where he pleases and to do as he pleases, bearing the expense himself, it cannot, of course, be said an injury received arises out of the employment or in the course of it. That was precisely the situation in the case of Boorde, supra, on which the plaintiff here relies, but the facts in the instant case are easily distinguishable.

The plaintiff went to Evanston on the evening in question for the purpose of performing services for her employer, the Betty Wales Shops. She performed the services under the direction of superiors who stood in the place of her employers. The trip to

the North Shore Hotel was clearly incidental to the services performed at the Orrington. The dinner at the defendant hotel was not in the nature of a purely social affair, which plaintiff attended by invitation as the guest of her employer. The purpose of the dinner was commercial, not social. When the accident occurred, Mrs. Gratz in charge of these employees, exercised her authority by giving the plaintiff directions to cease the outcry she made. The whole transaction of the evening was for the benefit of the business of the Betty Wales Shops, was arranged to that end, paid for by the employers and directed and controlled by them. The accident therefore arose out of and in the course of the employment.

On the uncontradicted evidence, plaintiff's right is that of compensation from her employer and the employer is, under the statute, subrogated to the cause of action, if any, which exists against the defendant. The instruction to find for the defendant was therefore proper and the judgment is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

348 - 30201

RANIER CLUB,
Appellant,

vs.

CITY OF CHICAGO et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 662

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The complainant is a corporation organized under the laws of Illinois for social purposes, including those of conducting debates, literary exercises and political discussions. At the time of the institution of this suit, it maintained furnished club rooms at 3010 South State street in the City of Chicago.

It filed its bill alleging that defendants, the Mayor of the City of Chicago and the Superintendent of Police, sought "to annoy and harass" it for the purpose of putting the club out of business and to that end made police raids on it; and that from October 16, 1923 to June 17, 1924, police officers without warrant, entered the club premises on seventeen different occasions and without cause arrested fifteen members without any evidence against them or reason for such arrests, and charged them with gambling.

It was alleged that all of these members were upon trial found not guilty and discharged by the judges of the Municipal Court of Chicago.

The bill further averred that these methods having proved unavailing defendants stationed a police officer in uniform in the club for the purpose of intimidating members thereof; that these

officers had no financial standing and that the club would suffer irreparable injury unless the relief prayed for, namely, an injunction restraining the defendants from committing these unlawful acts should be granted.

A temporary injunction was issued.

The defendants answered setting up that the alleged club was, in fact, operated as a gambling house and that poker and other games were indulged in there and that billiard and pool tables were used merely "for operating card games, poker games, crap shooting and other forms of gambling."

The answer further denied that the club was conducted for the accommodation of members and denied that it was conducted in an orderly and legitimate manner or that the defendants had sought to annoy or harass the club, but admitted that the defendants had made police raids upon the same and that these raids were made with authority of law. The answer denied that the plaintiffs who were arrested had on all occasions been found not guilty and discharged or that a police officer in uniform had been stationed in the premises and further denied that the club had or would suffer irreparable damages.

The cause was referred to a master who took the evidence and reported finding that the premises occupied by the club at 3010 South State street were then under lease to one Walter Speedy, personally, and that said Speedy had been the lessee of these premises for five or six years last past; that the furnishings of the club consisted of a pool table, billiard table and gas stove; that all moneys of the club were turned over and delivered to said Speedy by one Crosswhy who acted as secretary of the club; that Speedy paid all bills and together with Crosswhy dominated and controlled the premises occupied by the club, but neither Speedy nor Crosswhy had any occupation other than their connection with the

club; that they received no salary from the club and apparently had no other means of support; that there was nothing in the evidence that showed that the club attempted to carry out the original object for which it was organized, as set forth in its charter; that the by-laws of the club provided that the membership fee should be fifty cents and dues fifty cents a month; that the membership appeared to be in no way restricted; that the premises were situated on the second floor of the building and that about one-half way up the stairway leading up to the club rooms was a door which was always locked and was opened by a device operated by a guard stationed in the clubroom. Before any person was permitted to enter this room he was carefully searched and requested to check his knife or gun and all knives and guns thus collected were kept in charge of one of the agents or officers of the club and were returned to the members upon surrendering of checks when leaving the premises. A collection of these knives and guns were offered in evidence and have been transmitted to this court for its inspection.

Objections were filed by the complainant to the report of the master, and these objections by order of the court stood as exceptions. The exceptions were overruled and a decree entered dismissing the bill for want of equity at complainant's costs and from that decree the complainant appeals.

An examination of the briefs submitted in behalf of the complainant leaves us quite unable to understand upon what theory complainant asks for a reversal. The report of the master, which was approved, specifically found that the material allegations in the bill of complaint had not been proved, and neither in defendant's statement nor argument are we pointed to evidence in the record which would be sufficient to overcome this finding of the master which has been approved by the chancellor. Complainant cites Peteon v. City of Chicago, et al., 222 Ill. App. 80, to the point that the

city or its officers have no right to place policemen in private property or to harass and annoy, obstruct, or hinder a private institution. That case, however, is wholly inapplicable. The question at issue there was whether the City of Chicago, by virtue of powers conferred upon it by the Cities and Villages Act, had the right to require licenses from restaurants. Here while the report of the master did not specifically find that the complainant club was being run as a gambling house, that is the necessary inference from the facts found. It follows that complainant does not come into a court of equity with clean hands, and irrespective of other questions which arise on the record, the bill was for that reason properly dismissed. Bentley v. Tibbals, 223 Fed. 247; Weiss v. Herlihy, 23 App. Div. 608, 49 N. Y. S. 81; Samuels v. Oliver, 130 Ill. 73; Sullivan v. Chicago Board of Trade, 111 Ill. App. 492.

For the reasons indicated the decree is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

110 - 29748

HARRY ERICKSON,
Appellant,

vs.

JOHN SULLIVAN,
Appellee.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

239 I.A. 663

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This appeal must be dismissed for the reason that no proper appeal bond was filed in accordance with the order of the trial court allowing an appeal.

The abstract is meager, but we gather that on July 7, 1924, plaintiff obtained a judgment for $2500, and one of the parties was allowed "an appeal to the Appellate Court" upon the filing of an appeal bond. Subsequently a bond seems to have been filed and approved. Its recitals, set forth in an additional abstract of record, are that the defendant, John Sullivan, obtained a judgment against Harry Ericksen, the plaintiff, whereby an answer to a special interrogatory propounded to the jury was vacated and set aside, from which the said plaintiff, Ericksen, has prayed for and obtained an appeal to the Appellate court.

This bond does not purport to secure the judgment entered in the case, from which an appeal was prayed and allowed. An order setting aside an answer to a special interrogatory is not a final judgment from which an appeal may be had.

For the reason first above stated the appeal is dismissed.

APPEAL DISMISSED.

Matchett, P. J., and Johnston, J., concur.

151 - 29997

JAKE BRONOSKY,
Plaintiff in Error,

vs.

M. GROSS,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

239 I.A. 663

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover on a check for $200 executed by defendant to the order of Morris White, who endorsed and delivered it to the plaintiff. Payment on the check was subsequently stopped. Upon trial by the court it was adjudged that plaintiff take nothing, and he asks that this be reversed.

Plaintiff received the check as a deposit on account of a conditional purchase by White of a grocery store. Pursuant to an advertisement by plaintiff, the owner, in which it was stated that the store produced an income of $600 a week and the profit would be approximately thirty-three and one-third per cent, White with his brother-in-law, the defendant, interviewed plaintiff, who confirmed these representations. White agreed to buy for $3,500, upon condition that he, White, would be allowed to be present in the store for two or three days in order to verify plaintiff's representations, $200 to be deposited as earnest money and the balance to be paid if the income was as represented. These conditions were accepted by plaintiff, and White, not having funds with him at the time, asked defendant to give him his check for $200 to pay the deposit. Defendant did so and White endorsed the check and delivered it to plaintiff, at the same time telling plaintiff to retain the check until it was ascertained whether the store produced the represented income, and that if it did not, the check should be returned. White came into the store and remained during business

hours and discovered that the income was but fifteen or sixteen dollars a day. He informed plaintiff that the store was not producing anything like the income plaintiff had represented it would produce. Plaintiff suggested that the missing income could be made up by the sale of "moonshine," but White declined to enter into this occupation, saying that he had expected to buy a grocery and delicatessen store and not a saloon. White therefore called the deal off and asked for the return of the check, which plaintiff promised to return the following day. Anticipating that plaintiff might not keep his promise, defendant informed the bank of the situation and ordered payment of the check stopped.

Plaintiff does not question the correctness of the finding of the trial court as to the facts, but asserts that he is the holder of the check in due course, taking the same in good faith and for value without notice of any infirmity in the instrument. The facts as above stated negative this. Plaintiff acquired the check by misrepresenting the amount of the income from his store. He was not a third party in the transaction, to whom the check was assigned, but an original party dealing with White, the prospective purchaser.

An innocent holder of a negotiable instrument is required to have taken it in good faith. Schmitz v. American Trust & Savings Bank, 152 Ill. App. 76; Kuhlman v. Adkins, 180 Ill. App. 611.

A check no longer operates as an assignment pro tanto of the drawer's funds in the bank to meet the check. Karantonoulos v. Mid City Trust & Savings Bank, 222 Ill. App. 24.

Both the facts and the law justify the judgment of the court, and it is affirmed.

Defendant's counsel state that plaintiff originally prayed an appeal from the judgment of the court below and his appeal

bond was approved and filed, but that he did not make any further effort to perfect that appeal. They ask that statutory damages be assessed against plaintiff for failure to prosecute that appeal. Defendant might have been awarded such damages if he had filed a short record and asked for a dismissal with damages, pursuant to section 100 of the Practice act. This was not done, and we know of no authority for awarding such damages upon a writ of error such as this is.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

168 o 30017

MAE BELLE CONROYD as Executrix of the Last Will and Testament of Frank Conroyd, Deceased,
Plaintiff in Error,

vs.

YELLOW CAB COMPANY,
Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

239 I.A. 663

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks the reversal of an adverse judgment upon a verdict directed by the court at the end of plaintiff's case, in the trial of an action for damages on account of the death of Frank Conroyd.

Conroyd was killed in a collision between a Yellow cab owned by the Yellow Cab Company and a cab of the Diamond Cab Company in which the deceased was a passenger, at the intersection of North California avenue, a north and south highway, and Diversey avenue, an east and west highway in Chicago. Suit was originally commenced against the Diamond Cab Company and the Yellow Cab Company.

Plaintiff's declaration in four counts alleged (1) that deceased was a passenger in one of the taxi cabs of the Diamond Cab Company, then going southward on North California avenue and at the same time the Yellow Cab Company's taxi cab was going westward along Diversey avenue; that the drivers of both cabs approached the intersection at an unreasonable and unsafe rate of speed; (2) that California avenue at this point is a residence portion of Chicago, and Diversey avenue a business portion; that the Diamond cab was driven at a rate of speed in excess of fifteen miles an hour and the Yellow cab at a rate in excess of ten miles an hour, contrary to the statute; (3) a general allegation that each company negligently operated its taxi cab, resulting in a collision; (4) that the Yellow Cab Company

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violated the statute which gave the right-of-way to the Diamond Cab Company, which was approaching the street intersection from the right.

At the end of plaintiff's case the court directed a verdict for the Yellow Cab Company and plaintiff thereupon dismissed the suit as to the Diamond Cab Company.

The evidence tended to show that Conroyd had spent a good part of the evening with some friends playing cards; that at about one o'clock a. m. the party broke up and the host telephoned to the Diamond Cab Company for a taxi cab and Conroyd entered it to be taken home; that the place of the party was considerably north of Conroyd's home, and it is said to be a reasonable inference that the cab would follow the direct route to Conroyd's home, going south on California and crossing Diversey.

On the south side of Diversey in the block east of California is a fire engine house. A member of the fire department testified that on this night he was looking out of one of the north windows of this building onto Diversey avenue and saw a Yellow cab going westward on Diversey at about thirty-five miles an hour; that he saw it until it was about sixty-five feet east of California; that it was the only Yellow cab that he then saw; that within two seconds after it passed he heard a crash and at once went out onto Diversey and looked towards California and saw two cabs standing at the southwest corner at the intersection; that a police officer who had stepped into the fire house a minute or two before this, ran out and westward on Diversey towards the point of the accident. This police officer testified that he was in the fire house when the accident occurred; that he heard the crash and ran out onto Diversey and westward to the place of the accident, and found there a Diamond taxi cab and a Yellow cab at the southwest corner of the intersection of California and Diversey. He described the respective positions of

the vehicles, and said he found Conroyd sitting in the rear seat of the Diamond cab injured and bleeding; that he helped Conroyd out of the cab and in about five minutes, with the help of another man, placed him upon a southbound street car and the witness went with him to the police station, leaving the other man, McDermott, at the scene of the accident. It is stipulated that Conroyd died the next day as the result of the injury he received in this accicident.

McDermott testified that he approached the intersection on a southbound street car, which stopped at the north side of Diversey avenue, and that he went to the scene of the accident. He also described the respective positions of the taxi cabs, the Diamond cab headed southwest up against the post at the southwest corner, the Yellow cab headed northwest right into the Diamond, with its front end into the side of the Diamond cab where the driver sits; that he helped the police officer put Conroyd on the street car and then went back to the taxi cabs and there found Fink, the driver of the Diamond cab, lying fastened under the Yellow cab; that a few minutes later a Black and White cab came along and he and the driver of this cab got Fink from under the Yellow cab and they proceeded in the Black and White cab to take him to the police station, but Fink was dead by the time the station was reached. The police officer testified that he saw no one in the neighborhood of the accident except Conroyd and the driver of the Yellow cab until McDermott came up.

It is said that the trial court directed a verdict for the defendant on the ground that it was not shown that the Yellow cab which the fireman saw passing was the one in the collision.

The general rule is well established that upon a motion to direct a verdict all that the evidence tends to prove and just inferences to be drawn from it in plaintiff's favor must be

conceded to him and the evidence most favorable to him must be taken as true. It is for the jury and not for the court to draw inferences of fact from facts proven. Circumstances of certain facts, from which the jury may reasonably infer other facts which would reasonably follow, should be submitted to the jury. Divine v. Delano, 272 Ill., 179; Peoria Ry. T. Co. v. Industrial Co., 279 Ill. 385; Hydrox Co. v. Industrial Co., 291 Ill. 582.

The evidence that a Yellow cab went westerly at a speed of about thirty-five miles an hour and within a few seconds thereafter a Yellow cab collided with another vehicle at a point where the observed moving Yellow cab would reasonably be expected to arrive, the respective positions of the cabs after the accident, and the appearance of the Diamond cab after the collision, indicating that the Yellow cab had run into it violently from the east, with other circumstances, presented facts from which the jury might reasonably draw the inference that the Yellow cab seen by the witness passing the fire house on Diversey was the cab which was involved in the collision. At least it was for the jury to draw or refuse to draw such an inference and not for the trial court.

It was also for the jury under proper instructions to determine which of the two vehicles was entitled to the right-of-way. This would depend upon the direction and speed of the respective cabs These were questions of fact properly for the jury to determine.

Errors are claimed in the rulings upon the evidence touching the identity of the Diamond cab in the accident and its condition after the accident as shown by photographs. Such evidence was proper and should have been submitted.

The case should have gone to the jury. The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

177 - 30029

HENRY H. MAIER,
Appellee,

vs.

LEO J. DWYER,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

239 I.A. 663

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment for $5,000 entered upon a verdict pursuant to a peremptory instruction to find for the plaintiff.

By his declaration plaintiff alleged that defendant was indebted for $5,000 for money received by defendant for use of plaintiff, which defendant promised to pay on request, but refused to do so. Further, that defendant is a real estate dealer and broker and represented to plaintiff that he was able to purchase the premises at 7725-27 Sheridan Road for plaintiff free and clear of all incumbrances, for $60,000; that thereupon plaintiff paid defendant $5,000 as a deposit on the purchase price, and defendant agreed to deliver or cause to be delivered to plaintiff within thirty days after February 24, 1923, a good and sufficient warranty deed conveying the property free and clear of all incumbrances; that defendant wholly failed and refused to do so and still retains the deposit and fails to return the same.

Did the court err in instructing the jury to find for the plaintiff, or were there any controverted questions of fact which required the case to be submitted to the jury? The record shows that the trial court was of the opinion that there was no binding contract between the parties, that the money deposited was upon an indefinite, unenforcible contract, and that upon demand before the execution of a valid contract, it was the duty of the defendant to return the same. We are of the opinion that this conclu-

sion is correct and that the peremptory instruction was proper.

While there is some controversy as to immaterial matters, the undisputed evidence is that on February 24, 1923, plaintiff went to the office of defendant, a real estate broker, and was told by him that he could secure the premises in question for $60,000 free and clear of any incumbrance; that plaintiff should make a deposit of $5,000 and then a contract would be made with the owner, Barnard J. Holdengraber. Plaintiff did so, and received a written receipt from Dwyer, reciting only that he had received from Maier $5,000 on the building at 7725-27 Sheridan Road, balance due $55,000. Dwyer had no title to or interest in the premises. Plaintiff testifies that Dwyer said he would deliver the property inside of thirty days free and clear of any incumbrance and that he would turn over the $5,000 deposit to the owner and make a contract with the owner for the purchase of the premises. Plaintiff testified that nothing was done within the thirty days; that on March 24th defendant told him the property was so hopelessly involved that it would take a little longer. Plaintiff then informed him that as the thirty days were past and the building deteriorating, he did not want it, and asked that the deposit be returned, and defendant promised to do so. Defendant asked for a few days more, saying that if he could not get the property he would return the money. Plaintiff again called him April 14th and demanded the return of the money and defendant promised to mail it to him. Defendant Dwyer testified that it was the verbal understanding that he was to have sixty or ninety days to clear up the incumbrances on the property. Whether the time was thirty or ninety days is immaterial, for it is uncontroverted that no contract was made between the owner of the property and the plaintiff.

May 5, 1923, there was an alleged tender of a warranty deed to plaintiff, which evidently was an attempt to put him in default in the alleged agreement to purchase. It is admitted that at this time there were thirteen mechanics' lien claims of record against the property and also an outstanding contract of the owner with one Behan for the sale of the property. This alleged tender was not in accordance with any understanding or agreement. Plaintiff did not accept the deed but referred the parties to his lawyer.

The evidence shows that the money was paid to defendant with the understanding that he would procure from the owner a definite, binding contract for the purchase of the property. No such contract was made. As the purpose for which plaintiff paid the money wholly failed, he was entitled to have it returned and defendant was obligated to return it when requested. The material questions of fact are not in dispute and the court properly applied the law to the circumstances.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

193 - 30047

ALONZO M. FULLER,
Appellant,

vs.

CHARLES T. LOCHOW and THE GLOBE LAUNDRY COMPANY, a Corporation,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

239 I.A. 664

Certiorari denied

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment of nil capiat entered in an action of trespass, in which the plaintiff claimed that the defendants unlawfully removed certain laundry machinery from plaintiff's building.

There is ample justification for criticism of the brief filed on behalf of the plaintiff. It wholly ignores Rule 19 of this court, and we are inclined to agree with opposing counsel's statement that there is no brief in support of the appeal. As we have said many times, the points relied upon for reversal must be stated in the brief and the reviewing court should not be asked to search the record for error. Warner v. Armstrong, 214 Ill. App. 138.

However, we prefer to base our conclusion upon a single question of fact - namely, whether certain laundry machinery became a part of the realty owned by the plaintiff, so that a purchaser of the machinery could not remove it.

In December, 1914, plaintiff, Fuller, leased a building to James W. Pendleton, who proposed to operate a laundry therein, and to this end bought and installed certain machinery and appliances. In March, 1916, Pendleton executed and delivered a chattel mortgage to Fred W. Hunt to secure $1200. In October of the same year Pendleton executed another chattel mortgage to secure $200 conveying some of the appliances covered by the first

mortgage and subject thereto. Pendleton carried on the laundry business on the premises until November, 1916, when possession was taken under an attachment writ against him, in which Spengler Bros. were plaintiffs. A custodian and bailiff took possession of the laundry. Subsequently the two chattel mortgages were acquired by Spengler Bros., who commenced foreclosure proceedings and pursuant thereto, after notices were posted, all of the machinery and appliances were sold to Charles T. Luckow, defendant, for $2250. After the sale the machinery was removed from the premises.

Plaintiff claims that this laundry machinery became fixtures attached to the realty and that the purchasers at the sale unlawfully removed the same. As between the landlord and tenant, appliances put upon the premises by the tenant for the purpose of trade or manufacture, which can be detached without material injury, may be removed by such tenant. Galena Iron Works v. McDonald, 160 Ill. App. 211; Section 35, Chapter 80, Illinois Statutes, Tit. Landlord and Tenant.

The evidence shows that these laundry appliances were held in place by screws and that they could be easily removed by removing the screws without doing any material injury to the premises. What changes, if any, which were made in one of the windows or doors for the purpose of removing the boiler, were repaired. This situation is covered by Baker v. McClurg, 198 Ill. 28, where it is said that the intention of the parties when machinery is installed is largely controlling and that the rule in Illinois is liberal and in favor of the tenant. Other cases in point are Galena Iron Works v. McDonald, supra; Cross v. Deere Commission Company, 153 Ill. 499; Smith v. Railroad, 200 Ill. App. 368.

To the suggestion that the tenant, Pendleton, had abandoned the premises it is sufficient to reply that delivery of possession to an officer under order of a court is not abandonment.

Under the circumstances the machinery did not become attached as fixtures to the realty, and the tenant owner could dispose of the same in any way he saw fit. The judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

210 - 30063

4990a

HYMAN HORWITZ, Doing Business as H. HORWITZ CO.,
Appellant,

vs.

FIRST STATE PAWNERS SOCIETY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 664

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an action of replevin, with a count in trover, by which the plaintiff seeks to recover the value of a diamond ring which he owned and which he claims subsequently came into the possession of the defendant. Upon trial it was adjudged that the plaintiff take nothing, and from this he appeals.

The decision turns upon the evidence as to the identity of the ring. Only three witnesses testified, all introduced by the plaintiff.

Horwitz testified that he was a wholesale jeweler; that on October 4, 1924, he had a business transaction with one S. Kreinik, with whom he had previously done business as representing a Racine, Wisconsin, jeweler; that Kreinik on this date said that he had a purchaser for a diamond and selected a stone which plaintiff set in a ring and delivered to Kreinik to show his customer to determine whether the article was what was wanted; that if it was accepted Kreinik was to return within a few days and pay for it. Horwitz describes the diamond ring as a hexagon shaped "gent's" diamond ring, the stone weighing 1.07 carats, mounted with one sapphire on each side, 20 carat white gold; the complete ring and stone valued at $365. Kreinik failed to return, and plaintiff

called up his place of business and was informed that he had disappeared and it was not known where he was.

Sidney Oppenheimer, a clerk employed by the plaintiff, was present when the ring was given to Kreinik, and he describes the ring as a "gent's" gypsy ring, with sapphires on the sides; white gold; 20 carat; value $365. He says that he could not say whether the shape was octagon, hexagon, or square; that they have a series made up which come under the same heading, but different shaped tops, all having sapphires in the tops; that the term "gypsy ring" does not have any particular significance in the trade because gypsy rings have different shape tops, some being plain round and some fancy.

Samuel Wolfert, manager of the defendant, was called as a witness on behalf of the plaintiff and testified from defendant's records, which showed that on October 4, 1924, one S. Kreinik of 174 West Madison street, pawned a ring described as "Single stone, diamond, two sapphires, gent's, gold, white, gold octagon gypsy ring, approximate weight one carat, stamped 20 carat on the inside." This ring was still in the defendant's possession.

This was substantially all the evidence touching the identity of the ring. It is clear that, before the plaintiff can obtain a judgment against the defendant he must prove that the ring in defendant's possession is the same ring which he gave to Kreinik. This is the well established rule. Cook v. Borchek, 301 Ill. 603; Bowles v. Delaney, 84 Ill. 290; Charles Mee Company v. League Company, 108 Ill. App. 128; Byck v. Bassingham, 120 Ia. 363; 94 N.W. 920.

The words describing the ring as a single diamond, "gent's," with two sapphires, 20 carat, white gold, gypsy ring, weight 1.07 carats, are terms of such general description as not sufficient in themselves to identify the particular ring. The

shape, however, would furnish a distinguishing mark. Plaintiff says that the ring he gave Kreinik was hexagon shaped. Defendant's manager says the ring pawned by Kreinik was octagon shaped. There is a clear difference between the two.

The most plaintiff can claim is that the circumstances raise a strong suspicion that the ring pawned by Kreinik is the one he received from plaintiff. But evidence which merely raises a suspicion does not meet the required degree of proof necessary for the plaintiff to be awarded a judgment. Jeffries v. Ayer & Lord Tie Company, 184 Ill. App. 533. The burden is upon the plaintiff to prove that the ring pawned with the defendant is the identical ring plaintiff delivered to Kreinik, and upon the record the trial court was justified in holding that the plaintiff had failed to prove this sufficiently. The judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

231 - 30084

4770

RICHARD DYKSTRA, a Minor, by ANNA FABER, his Mother and Next Friend,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

239 I.A. 664
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit in which Richard Dykstra, a minor, described in the briefs as plaintiff, had a verdict and judgment for $15,000. Defendant asks for a reversal.

The accident happened on August 10, 1922, at about two o'clock p. m. Plaintiff, then twelve years old, was riding on a Ford truck which was going north on Parnell street in Chicago. At the same time Henry Chapman, a foreman of the Water Pipe Extension Department of the City of Chicago, was driving westward on 115th street in a Cadillac touring car. At the intersection of the two streets the cars collided, the Cadillac driven by Chapman striking the Ford truck near its center, knocking the truck over against the northwest corner and tipping it over. Plaintiff, with a companion, was sitting on the floor of the cab of the truck with his feet on the running board. The Cadillac car struck his legs, inflicting severe injuries.

Counsel for the defendant says in his brief that the City is willing to rest its case solely upon the point that Chapman at the time of the accident was not engaged within the scope of his employment as an employee of the City.

Chapman was employed by the City as a supervisor or inspector of hydrants, water pipes and other things connected with

the city water supply. He had supervision of the territory extending from 87th street south to the city limits and from the lake on the east to California avenue on the west. He did nothing under specific orders, but as defendant's counsel describes him, he was a "foreman, almost a king in his sphere." This means that he came and went as he pleased on his tours of inspection up and down the streets within the district, noticing the condition of the hydrants, watching for leaks in water pipes and exercising similar duties. He went anywhere in the territory. He sometimes would stop at the fire department stations and would leave word where he could be reached in connection with any complaints within his territory. This accident happened within his territory.

On the forenoon of the day in question Chapman had been to his office and then went home to lunch. A little after one o'clock he went to the fire department station at 36 East 113th street to inquire if there had been any calls from the office for him. From the station he drove north on Michigan avenue to 113th street, and then west on 113th street to Parnell, where the accident happened. As he drove along 113th street he observed the pipes and hydrants along the way, and testified that if he had noticed anything wrong with them it would have been his duty to examine the same and have the proper men come to make repairs, that there were twelve or thirteen hydrants along 113th street at this point.

Chapman testified also that while going west on 113th street he was on his way to Lowe avenue to see a man called "Scully the Dago," on behalf of a neighbor, William McLaren, who had asked him to find some one to do some excavating. Chapman says that this was not his only purpose in making this trip along 113th street, although it was the main purpose. McLaren was not called

as a witness to corroborate Chapman, who further testified that he did not at any time before or after the accident see Scully about this excavating job that his neighbor wanted done.

The Cadillac car driven by Chapman was owned by him but the City paid him $75 a month for its upkeep, so that he could use it in traveling over his territory.

Whether the accident happened while Chapman was within the scope of his employment was a question of fact for the jury, and we cannot say that its verdict in this respect was clearly against the weight of the evidence. The jury might reasonably have refused to accept Chapman's uncorroborated statement that one of his purposes as he went west on 113th street was to do the errand for his neighbor, McLaren. It is not without significance that one block westfrom the place of the accident the City Pipe Extension Department was putting in three blocks of new pipe, which Chapman might reasonably be expected to inspect; but accepting his statement that one of his purposes was on behalf of his neighbor, he does not claim that this was the sole purpose, and it is evident that he was at the same time performing his usual and customary duties of inspecting the water hydrants and pipes along the street. He did not cease to be acting within the scope of his employment because incidentally he had an additional matter in mind. Applicable to this situation is the statement in Shearman & Redfield, Law of Negligence, 6th ed., vol. 1, sec. 147a, supported by a number of cases, as follows:

> "This, too, it must be recognized, is consistent with the generally received doctrine that the mere mingling by the servant of some pupose of his own with that of the master will not relieve the master of liability. One does not cease to be acting in the course of his master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual, or incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be his controlling purpose."

And further from the same authors, vol. 1, section 147:

> "Where a servant is allowed by his master to combine his own business with that of the master, or even to attend to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in, when a third person was injured by his negligence; but the master will be held responsible unless it clearly appears that the servant could not have been directly or indirectly serving his master in the act, the negligent performance of which caused the injury."

Our Supreme Court in Schweiss v. Industrial Commission, 292 Ill. 90, has said:

> "A workman is said to be 'in the course of his employment when within the time covered by the employment he is doing something he might reasonably do while so employed at a place where he might reasonably be while in the employment. The test is triple, and relates to time, conduct and place.'"

Chapman's duties within his territory were such that, while inspecting the hydrants, water pipes, etc., within his hours of employment, he was continuously engaged in the discharge of his duties and could not be held to be otherwise employed unless the tortious act in question had no relation to or connection with his employment. Labatt on Master and Servant, vol. 6, p. 6950. Many additional supporting cases might be cited, but the statements of the general principles applicable are sufficient.

As to defendant's negligence, the jury properly could believe that, as the Ford truck on which plaintiff was riding was about even with the south curb of 113th street, defendant's automobile was approaching Parnell, coming westward on 113th street about a half block away at about twenty-five miles an hour. One witness, who saw the accident from the window of her home, says she saw the defendant's car when it was two blocks away; that it was coming "pretty fast" and did not slow down at any time before the collision. As the Ford truck crossed 113th street it was traveling about ten miles an hour, crossing the intersection. Chapman, the driver of defendant's car, says that as he approached Parnell he

saw a friend of his in a standing automobile headed south on Parnell, north of 113th street; that he had known this friend for twelve or thirteen years, and that he, Chapman, "probably paid more attention to him than to the truck."

The stories of the witnesses vary somewhat, but considering these in connection with the circumstances we cannot say that the jury was not justified in finding defendant's driver guilty of negligence, causing the accident.

Whether or not plaintiff, a twelve year old boy, was guilty of contributory negligence was properly submitted to the jury, and its conclusion that he was not guilty is not seriously questioned.

It is said that the verdict for $15,000 was excessive. Both legs were seriously injured, the bones in each being broken; the right foot was crushed; and the evidence shows that the injuries were very extensive and serious. The boy was in the hospital at one time for eleven weeks, and was again taken there in an attempt to grow flesh on the injured right heel. Altogether, nine different operations were performed. The injury to the right foot and heel is permanent, and plaintiff must walk on his toes, as the heel does not come to the floor. A verdict for such an amount might have been thought excessive in earlier days, but under present economic and social conditions the award of $15,000 as compensation for such serious injuries as plaintiff received cannot be said to be excessive.

The judgment was proper and is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

259 - 30113

HERBERT M. HAHN and RUDOLPH T. ANDERSON, Doing Business as HAHN & ANDERSON,
Appellees,

vs.

MONTMARTRE CAFE, Inc., a Corporation, sometimes known as Montmartre Cafe Co.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 664

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a motion of the defendant to vacate a judgment entered by confession and for leave to defend. The affidavit of defendant's secretary accompanying the motion alleged a number of facts which should have moved the court to grant the motion.

The first point was that the note was not made by defendant but made by one R. S. Strauss, who conducts a cafe under the name of Montmartre Cafe Co. The note is in the first person, "I," and is signed "Montmartre Cafe Co., by R. S. Strauss." The judgment is against the Montmartre Cafe, Inc., a corporation. Thus a question is raised as to whether the note was the obligation of the corporation or the obligation of Strauss individually, and evidence should have been heard to establish the identity of the maker.

The same objection is made against the power of attorney to confess judgment. This does not purport to be signed by the defendant corporation. It also runs from the first person, "I," and authorizes any attorney "to appear for me" and confess judgment, confirming all that "my said attorney may do." The general rule is that a power of attorney must be construed strictly and such attorney can act only within the strict letter of his authority. Chase v. Dana, 44 Ill. 262; Mayer v. Fick, 192 Ill. 561; Keen v. Dunn, 256 Ill. 11.

A material and unauthorized alteration of the note and power of attorney was claimed by the insertion of $165 as an attorney's fee. The insertion, in the blank space, of an attorney's fee does not necessarily invalidate an instrument where evidence shows that filling in the blank was contemplated by the parties, that the amount is reasonable and the insertion made within a reasonable time. Schnitzer v. Kramer, 268 Ill. 603.

Failure of consideration was alleged in defendant's affidavit in that the note was given to the payee, Frank J. Taylor, in part payment for painting and decorating a restaurent, such work to be completed by a certain date, and defendant alleged that not only was the material and workmanship of an inferior quality, but that the work was not completed by the required date and that these deficiencies caused damages; that Taylor conceded his failure fully to perform the contract and agreed that if Strauss would waive his claim against him for loss, he would cancel and surrender the note to Strauss; that prior to the endorsement and delivery of the note to plaintiffs they were fully informed of the part failure of the consideration; that Taylor had agreed to cancel and surrender the note, and that plaintiffs received the note from Taylor with full knowledge of these facts.

If these allegations by defendant could be sufficiently proven they would constitute a defense to the suit. Section 33, paragraph 48 Negotiable Instruments Act; Continental Construction Co. v. Henderson County Public Service Co., 227 Ill. App. 43. Failure of consideration is a good defense against any person not a holder in due course, as described in section 52, par. 72, Negotiable Instruments Act, Illinois Statute. (Cahill.)

The affidavit presented a prima facie defense and upon the showing made defendant was entitled to have the judgment opened

for the purpose of allowing it to plead and defend.

The order of the Municipal court is reversed and the cause is remanded with directions to grant defendant's motion.

REVERSED AND REMANDED
WITH DIRECTIONS.

Matchett, P. J., and Johnston, J., concur.

268 - 30121

R. G. BADEAUX, doing business as R. G. BADEAUX & COMPANY,
Appellant,

vs.

JOHN M. DAVIES,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 664

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of nil capiat in an action seeking to recover commissions as a real estate broker.

February 11, 1924, F. B. Davies, a real estate broker and a brother of the defendant, John M. Davies, listed the property in question with the plaintiff for sale at a price of $23,500. Plaintiff testifies that subsequently he procured a purchaser for $23,500 cash, and so informed F. B. Davies, who, on the contrary, testifies that the price submitted by the plaintiff was $22,500, $10,000 to be in cash. F. B. Davies says that on the same day this offer was made, March 15th, he submitted it to his brother, the defendant, and they concluded to decline the offer and withdraw the quotation made to plaintiff. On this date a letter was written by him to plaintiff, stating that the owner refused the proposition submitted that day, and that all previous quotations were withdrawn. Subsequently the property was sold to Henry E. Donovan, who was a tenant upon the premises in question and who had been negotiating with F. B. Davies for the purchase of the property. This sale to Donovan was closed in September.

The decision of the case turns upon the question of fact as to whether the plaintiff, as claimed by F. B. Davies,

made an offer of $22,500, $10,000 of which was to be in cash, or whether, as plaintiff testifies, the offer was $23,500 cash, thus meeting the price placed upon the property when it was listed with him.

It is an old rule that ordinarily courts of review will not disturb the conclusions of a jury or trial court upon the credibility of the witnesses, for we have not the opportunity which they have for observing the appearance, manner and demeanor of the witnesses while testifying. The burden was on the plaintiff to prove his version of what took place between him and F. B. Davies, and if they contradict each other we cannot say that the finding of the trial court that plaintiff has failed is clearly against the weight of the evidence.

One circumstance which tends to corroborate F. B. Davies' version is that the property was sold to Donovan for $23,500 cash, which would indicate defendant's willingness to accept any offer upon these terms. No good reason is suggested why defendant should have refused to accept the offer plaintiff claims to have made, when at about the same time he was willing to and did accept this offer from another party. There is not sufficient in the record to justify us in setting aside the conclusion of the trial court upon the facts.

At the beginning of the trial, from preliminary statements made by counsel, it became evident that plaintiff was relying upon the conversation of March 15th with F. B. Davies as tending to prove that he furnished a purchaser for the property, while defendant's counsel apparently had expected that plaintiff would rely upon what took place on March 24th or 25th. Thereupon, when all of the testimony was introduced, defendant's counsel stated that he had been taken by surprise by plaintiff's claim that he presented a

purchaser on March 15th, and asked for and obtained leave to file an amended affidavit of merits. This affidavit put in issue the real controversy, as disclosed by the evidence, and was properly allowed. Such motions are addressed to the discretion of the court, and its rulings thereon will not be reversed unless an abuse of discretion clearly appears. Harris v. Willis, 209 Ill. App. 401.

After the evidence was in counsel for plaintiff asked for a continuance that they might bring in the man who, as plaintiff had testified, had made an offer of $23,500. The court indicated its willingness to continue the trial, but as the parties seemed to be unable to agree upon a date when the trial should be resumed and as plaintiff's counsel also coupled with his motion for a continuance a motion that all of the testimony should be stricken and a new trial granted, the court finally denied such motions and proceeded to decide the case. There was no error in this. Furthermore, the testimony of the proposed purchaser as to what proposition he might have made to the plaintiff would have been incompetent.

There were no reversible errors upon the trial, and as we are not warranted in disturbing the finding of the court on the facts, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

287 - 30140

W. R. GUILE COMPANY,
a Corporation,
Appellee,

vs.

JOHN H. LESLIE, GEORGE H. LESLIE, Doing Business as JOHN H. LESLIE & COMPANY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 665

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In this suit plaintiff sought to recover the agreed price for a quantity of canned raspberries sold by it to the defendants and upon trial had a verdict for $1672.13. From the judgment thereon defendants appealed. Both parties are dealers in canned fruits, and the defendants assert a set-off, alleging that they had a contract for a larger amount of goods than were delivered by plaintiff, whose failure in this respect caused the defendants damage.

The decisive question in the case relates to negotiations with J. L. Goldsmith, a broker, and is whether these negotiations amounted to a binding agreement upon plaintiff to deliver a larger amount of canned raspberries than were actually delivered.

Plaintiff is a New York corporation, dealing in canned fruits and vegetables, and its factory is at Rushville, New York. The defendants were dealers in canned fruits, etc., in Chicago. J. L. Goldsmith is a canned goods broker in Rochester, New York. Goldsmith, prior to these negotiations, had been doing business with the defendants for some years, but was hardly known to plaintiff. In July, 1922, Goldsmith had some conversation with one of the officers of plaintiff with reference to placing an order for canned raspberries. Defendants claim that these conversations

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amounted to a contract, but this is not admitted.

On July 7th Goldsmith sent a letter to plaintiff purporting to confirm a telephone conversation relating to an order and enclosing a form of contract reciting that 1000 dozen of a certain brand of raspberries, 2800 dozen of another kind, and 1200 dozen of still another kind had been sold to defendants on account of plaintiff. This form of contract was on the letterhead of Goldsmith and blanks were left for the signatures of the buyers and seller. Thereafter, in August, plaintiff wrote defendants, referring to this form of contract sent by Goldsmith, and saying:

"Can only accept the following:

"Have only 228½ dozen #10 tins of Black Raspberries in water for which we can accept $7.35 per dozen for quick shipment. 213 doz. #10 tins of Columbian Red Raspberries in water at the same price of $7.35, both for quick shipment and F. O. B. factory.

"Have had several offers from J. L. Goldsmith, but as we are not well acquainted with the gentleman, thought best to take the matter up directly with you.

"If these prices are satisfactory to you let us know by wire, and we will get them rolling. Consider this price very low in Black Raspberries. Shouldat least get $7.50 for these goods.

Awaiting your reply, we are."

To this defendants replied on August 29th:

"Yours of the 23rd received and noted.

"You may ship us the 228½ dozen #10 Black Raspberries via cheapest freight at once.

"We do not care for the #10 Columbia Raspberries."

To which on September 1st plaintiff replied:

"We acknowledge receipt of your favor of the 29th stating that we should ship at once 228½ doz. #10 tins of Black Raspberries."

These goods were subsequently shipped and are the subject matter of plaintiff's claim in this suit. On October 19th plaintiff wrote, inquiring as to the receipt of these raspberries and whether they were satisfactory. On October 28th defendants

replied that the berries had been received and were satisfactory, but asserting that they were waiting to hear from plaintiff as to the shipment of other goods, to which plaintiff replied that it had shipped all of the goods which had been ordered and requesting a check.

The jury could properly conclude that whatever may have been the authority or relation of Goldsmith to the respective parties prior to August 23rd, all prior negotiations were merged in the letter of plaintiff of that date and the reply thereto by defendants of August 29th. There was then a definite statement that plaintiff could undertake to sell only 228½ dozen #10 tins of Black Raspberries and 213 dozen #10 tins of Columbian Red Raspberries. Defendants ordered the former and refused the Columbia raspberries. It follows that defendants were properly held liable to pay for the raspberries delivered at the agreed price. We are of the opinion that this is the controlling fact in the case, and the alleged errors in the ruling of the trial court upon the evidence and upon the oral instructions, unobjected to at the trial, are not of sufficient importance to justify a reversal. No other verdict could have been properly rendered on the facts.

The judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

342 - 30195

4 795a

JOSEPH IGLITZKY and PHILLIP SHAPIRO, Copartners, doing business as THE INDEPENDENT CLOAK CO.,
Appellees,

vs.

L. SINGAL CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 665

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, bringing suit to recover for labor and material furnished by them to the defendant, upon trial by the court had judgment for $160.80, from which defendant appeals.

Plaintiffs' claim was for labor in making coats for the defendant. None of the items are in dispute except the last charge, which is $75 for making three coats. Defendant's testimony tended to show that all of the coats were to be made at an agreed price of $5 a coat, and that plaintiffs should not have charged $25 a coat for the particular three coats which are the subject of this controversy. Plaintiffs' testimony tended to show that the coats made, except these three, were ordinary, cheap coats, but that these three were to be especially good coats and the price as to these three was left open; that these three coats were made of high class material - Jerome cloth; that there was very little machine work on the three coats, and one of the plaintiffs testified that it took him a week to make them, whereas to make up one of the other coats would take only four hours.

The decision of the trial court was based on the credibility of the witnesses. Plaintiffs' testimony that these three coats were of a special character, requiring longer time to make, was not seriously controverted. Under the circumstances we cannot say

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that the finding of the lower court was not justified. The judgment will therefore be affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

351 - 30204

CLARA J. PRIDMORE,
Appellant,

vs.

ERWIN S. HOTTINGER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

239 I.A. 665

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an adverse judgment upon a verdict against her in a suit to collect rent claimed to be due and owing under a written lease.

On March 6, 1923, under the power of attorney in the lease, a judgment was entered against the defendant for rent for July, August and September, 1917, amounting to $195, and also for attorney's fees. Subsequently, upon motion supported by affidavit of the defendant, he was granted leave to appear and defend, and the case went to trial before a jury upon the declaration of the plaintiff and upon the affidavit of merits of the defendant as amended.

There is virtually no dispute as to the facts. Plaintiff made a lease to defendant, dated March 13, 1917, demising an apartment for defendant's residence. The rental was $65 a month, and the lease terminated April 30, 1919. Rent was payable at the office of Murray & Quan, 1200 Devon avenue, Chicago.

In April, 1917, defendant had a conversation with Mr. Quan, with whom he had had all of his dealings with reference to renting the apartment and paying the rent. He told Mr. Quan that he expected to be called into the military service of the United States government in connection with the World war, and that he would not be able to pay the rent under the lease out of his pay received from the government. Mr. Quan promised to see the landlord about the matter. Subsequently, in June, defendant was informed by

Mr. Quan that the landlord had said that it would be all right for the defendant to give up the premises. Thereupon the defendant surrendered the keys to Mr. Quan, who accepted them. Thereafter defendant heard nothing further about the matter until this judgment was entered in 1923, or nearly six years after the conversation with and the surrender of the keys to Mr. Quan.

Mr. Quan, testifying, does not deny defendant's testimony but saysthat his memory is rather "hazy" about the entire transaction, as it happened some six or seven years before and "has been off my mind for some time."

The husband of the plaintiff testified that Mr. Quan never approached him with any proposition regarding the cancellation of the lease, and that he (plaintiff's husband) had active management of the property in 1917.

It is urged that the affidavit, upon which the court acted in permitting defendant to appear and defend, does not sufficiently disclose a meritorious defense. Even if it might be said to be insufficient to justify the court in acting, yet subsequently the affidavit was so amended as to present a meritorious defense and the case went to trial upon the issue thus made. We know of no rule which would require a reviewing court to reverse a judgment entered upon a proper verdict in a trial of proper issues upon the sole ground that the first affidavit filed may have been insufficient. Whatever error there may have been in this respect was cured by the amendment.

Defendant claims an executed parol agreement to cancel the lease, acquiesced in and ratified by the plaintiff. A lease under seal may be cancelled and surrendered by an executed parol agreement. Alschuler v. Schiff, 164 Ill. 298.

If an agent transcends his authority and the principal

is informed of what has been done, he must dissent and give notice of it within a reasonable time; and if he does not, his assent and ratification will be presumed. Williams v. Merritt, 23 Ill. 573; Searing v. Butler, 69 Ill. 575; Barbour v. Mortgage Company, 102 Ill. 121; L. R. A. 1918C, 225 note.

Under the facts, showing the long silence on the part of the plaintiff, the jury could properly conclude that she acquiesced in the surrender and cancellation of the lease and give a verdict for the defendant. We see no reason to disagree, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

36C - 30213

THOMAS MANUFACTURING COMPANY,
a Corporation,
Appellant,

vs.

FRANK BAACKES,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

239 I.A. 665

MR. JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

Plaintiff alleged by its statement of claim that the defendant was indebted to it in the sum of $4539.35, representing a balance due upon a guaranty for an indebtedness of the World Phonograph Company, which went into bankruptcy. An amended statement of claim was filed which, on motion, was stricken and a third amended statement of claim was filed, which was also stricken, and plaintiff electing to stand by same, its suit was dismissed and judgment entered accordingly, from which it appeals.

The sole question is whether a letter written by defendant to plaintiff was a guaranty of the obligations of the World Phonograph Company.

By the third amended statement of claim plaintiff alleges that the World Phonograph Company desired to purchase goods from plaintiff on credit, but that plaintiff refused unless a guaranty of payment was given, and that plaintiff requested defendant to write a letter setting forth the history of the World Phonograph Company and to include in the letter a guaranty in writing; that pursuant to this request the letter of April 5, 1919, was written by defendant and sent to plaintiff; and that relying thereon it sold the World Phonograph Company certain goods, for which there is a balance due, no part of which has been paid.

The letter is as follows:

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"April 5th, 1919.

The Thomas Manufacturing Company,
Dayton, Ohio.

Gentlemen:

I am in receipt of your favor of the 4th inst., with reference to the World Phonograph Company. In reply beg to say that I am President of this Company, and it is backed by a good deal of money; its history is as follows: about a year and a half ago I induced some friends to join me and we put $50,000 in cash into this business to help a friend of mine. He did not make a success of it but lost some money. This, however, has been recovered under the present management. The World Phonograph Company has always met its obligations and will meet its obligations in the future, and you need have no hesitation in extending them the credit they ask. If anything should happen the stockholders of the World Phonograph Company, including myself, will see to it that every account is paid; we could not afford to do otherwise. I refuse, however, to endorse any paper. The standing of the stockholders of this institution is sufficient guarantee as to its business. We intend that this concern shall work out its own salvation; let them do it. They have on their books now business in the amount of half a million dollars which carries a fair profit. The World Phonograph Company has had all of the diseases that every new concern has to contend with but we have gotten over them and we are getting healthier every day.

I hope, therefore, in view of the foregoing that you will feel inclined to extend them credit they ask. If not, let us know by return mail so that we may make arrangements elsewhere, because it is most essential that we get motors to the extent of the order placed with you.

Yours very truly,
F. Bauches (signed)
Vice-President & General Sales Agent."

In determining whether this letter is a guaranty it is must be construed as a whole and the intention to be collected from the entire instrument and not from detached portions. Chicago Home for Girls v. Carr, 300 Ill. 478.

Construing the letter as a whole we cannot agree with the contention that it is a guaranty. It is rather an attempt to set forth the management, backing and standing of the World Phonograph Company in such a favorable light that plaintiff would be willing to extend it credit without any guaranty. Plaintiff singles out the sentence that, if anything should happen, the stockholders, "including myself, will see to it that every account is paid; we could not afford to do otherwise." But this must be taken in connection with the two sentences immediately following,

in the first of which defendant says that he refuses to endorse any paper, and that "the standing of the stockholders of this institution is sufficient guarantee as to its business." We construe this to mean the unwillingness of the writer individually to guarantee any indebtedness, but as calling attention to the standing of the stockholders with the view of persuading plaintiff to believe that, because of their reputation and standing, the affairs of the Phonograph company would be so managed that plaintiff would feel justified in giving the company credit. This construction is emphasized by the following statement that the stockholders "intend that this concern shall work out its own salvation; let them do it." Then follows a favorable statement as to the amount of business the company is doing, and the letter concludes with an expression of the hope that, in view of what has been said in the letter, plaintiff will feel "inclined to extend them the credit they ask." But if the plaintiff does not feel so inclined, it is to "let us know by return mail so that we may make arrangements elsewhere." This concluding sentence positively contradicts any construction of the letter as a guaranty. The statement that, if plaintiff would not extend credit to the company itself, the order would go elsewhere, is wholly at variance with a guaranty.

We hold that the trial court correctly held that the letter was not a guaranty and that the third amended statement of claim stated no cause of action against defendant.

The judgment is proper and is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

372 - 30235

JOHN WISZNOROWSKI, Administrator of the Estate of Joseph Gusowski, Deceased,
Appellee,

vs.

CHICAGO AND JOLIET ELECTRIC RAILWAY CO., a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

239 I.A. 666

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On October 21, 1920, Joseph Gusowski was struck and killed by one of the defendant's cars. On suit brought by the administrator of his estate defendant suffered a verdict and judgment of $5,000.

Defendant asks for a reversal on the grounds that Gusowski, hereinafter called plaintiff, was guilty of contributory negligence causing his death, that defendant was not guilty of negligence, errors upon the trial in remarks of the court, improper argument of counsel, rulings on evidence, and in giving and refusing instructions.

We are of the opinion that errors upon the trial compel us to reverse the judgment and remand the cause.

The accident happened at the intersection of Archer avenue and Lockwood avenue. Archer runs in a southwesterly direction and Lockwood runs north and south. Plaintiff, eighteen years of age, with three other young men, on the evening of the occurrence, was in a group talking on the south side of Archer avenue. After awhile they started to go northerly, crossing Archer. The easterly cross-walk was a cinder path. Plaintiff's companions preceded him and crossed the south track in safety, but he was struck by a west-bound car running on the south track.

Some of plaintiff's companions testified that they looked both west and east and saw nothing; that when the car passed them it was going about thirty miles an hour; that they heard no warning signal until after they had crossed the track. The tracks were being reconstructed at this point and the cars were operating on either the west or east bound tracks, and the car in question ran on the south or east bound track at the time of the accident on account of the reconstruction work on the north-bound track. The cross-over switch from the north to the southerly track was about half a mile east of Lockwood avenue.

There were conflicting stories as to the presence of a light on the car and also as to its speed, plaintiff's companions testifying that the headlight was not burning and that the curtains on the front vestibule were pulled down so that they could not see the interior lights of the car. A number of witnesses testified that no warning was given by whistle or bell until about the moment when plaintiff was struck. In view of the variant stories as to warning signals, the absence of lights on the car, its speed as it approached the crossing, and also the pertinent fact that the car was going westerly on the track customarily used by east bound cars, it was wholly a question for the jury to determine whether or not defendant was guilty of the negligence charged as causing the accident, and whether or not plaintiff was guilty of contributory negligence. As there must be another trial, we do not discuss the evidence more in detail.

It is a commonplace experience that the presiding judge may by words and bearing influence a jury either for or against one of the parties in the trial.

> "Every one with any experience in the trial of cases in court appreciates that any intimation, however slight and unconsciously made, by the court in the presence of the jury is liable to have the force and effect of evidence and may be most damaging to the party against whom it is made." People v. Lurie, 276 Ill. 630, 641.

It is impossible to avoid the conclusion that the presiding Judge in this case, doubtless unconsciously, influenced the jury to believe that he was critical of, if not antagonistic to, the defense presented, or at least the manner in which defendant's counsel was presenting it.

One of plaintiff's witnesses had referred to his father's saloon on the corner. On cross-examination defendant's attorney inquired about the distance the car went with reference to this saloon. The court sustained an objection on the ground that there was no such thing as a saloon in existence now, and used language tending to rebuke defendant's attorney for using that word, although that was the word used by the witness on direct examination in identifying the building.

The court frequently made objections to questions put by defendant's attorney and sustained them. One witness had testified that he had not heard the car coming, and on cross-examination for the purpose of testing his hearing he was asked if he could then hear the cars on the street near the courthouse. The court of his own motion made an objection and sustained it. One witness for the plaintiff had testified that he was paying no attention to the speed of the car, but was permitted to give an opinion thereon, although he had not shown any qualifications, the Judge stating that "anyone can judge speed."

Defendant sought to show that the car was running on the east-bound or southerly track pursuant to orders, but it was not allowed to do so nor even to make an offer to prove this. The court also undertook to examine one of the defendant's witnesses, asking, "Did you have any notices ahead of time that you were on the wrong track or on the irregular track?" Plaintiff's declaration did not allege any negligence with reference to any notices, and this ques-

tion would tend to give the jury the impression that, in the opinion of the presiding Judge, such notices were necessary and their absence negligence.

Many other like incidents occurred, which it is unnecessary to relate. We are inclined to believe that the conduct of the presiding Judge tended to create an atmosphere hostile to the defendant, which prevented it from receiving from the jury fair and impartial consideration of its theory of the accident.

It was error to refuse to strike out the testimony that there were no gates or watchman guarding the tracks at Lockwood. This was a street car line, and not a railroad crossing, and this testimony was wholly immaterial. Refusal of the court to strike it would doubtless lead the jury to believe that the absence of these things tended to show negligence on the part of defendant.

Again, in cross-examining the witness Redmon, defendant's counsel attempted to read his testimony from the coroner's transcript of evidence, for the purpose of correcting an impression thought to be created by parts read by plaintiff's attorney for the purpose of impeachment; but the court refused to allow this unless the entire deposition should go in as evidence. This was error. Foster v. Shepherd, 258 Ill., 164; C. C. Ry. Co. v. Sundy, 210 Ill. 39.

At plaintiff's request, the court instructed the jury, in substance, that in determining upon which side the preponderance of the evidence is, the jury should consider, among other things, the interest or lack of interest, if any, of the witnesses in the result of the suit. No witness who testified to the occurrence had any interest in the outcome of the suit. This instruction was clearly directed at the motormen, the conductor, and an engineer employed by defendant, who testified as to the reconstruction work and the headlight on the car; also other employees of defendant

testified. The giving of this instruction aimed at defendant's employees was erroneous. Roberts v. C. C. Ry. Co., 262 Ill. 329.

Instruction VI offered by defendant was refused. The instruction offered is as follows:

"VI. If you believe from the evidence under the instructions of the court, that ordinary care on the part of the deceased for his own safety required him, before going upon or in close proximity to the street car track in question, at the time and place in question, under all the circumstances in evidence to look for the purpose of ascertaining whether a car was approaching upon said track and not go upon or in close proximity to said track without looking; and if you believe further from the evidence, under the instructions of the court, that the deceased, if he had so looked, could by the exercise of ordinary care, have seen said car approaching upon said track in time to have avoided injury by the exercise of ordinary care for his own safety; and if you further believe from the evidence that deceased did not look to ascertain the approach of said car and that he went upon or in close proximity to said track at the time and place in question without having looked to ascertain the approach of said car; and if you believe that such failure to look - if he did fail to look - was, under all the facts and circumstances as you find them from the evidence, under the instructions of the court, negligence on his part and that he was struck by or came in contact with said car because of said failure, then plaintiff cannot recover in this action, and you should find in favor of the defendant."

There was no other instruction that contained the proposition here presented except those of a general character. It presented an important defense and should have been given. C. C. Ry. Co. v. O'Donnell, 208 Ill. 267; Fowler v. C. & E. I. R.R. Co., 234 Ill. 619.

It was also error for the court to refuse instruction IX requested by the defendant, which is as follows:

"IX. The court instructs the jury that while a motorman of a street railway in operating cars is bound to have regard for the rights and safety of others, yet he is not obliged to be all the while on his guard against the unusual, extraordinary and not reasonably to be expected; and if the jury believes from the evidence, under the instructions of the court, that deceased's getting on the track in front of said car, if he did so, or his coming in contact therewith, was, under all the facts and circumstances as you find them from the evidence, extraordinary, not reasonably to be expected, or unusual, and that as the car approached the place in question, at the time in question, the car was being operated with ordinary care by the motorman in charge thereof, then it became the duty of the motorman to stop his car only as soon as he had notice or knowledge of the in-

tention of deceased to do as he did - if you believe that what he did was not usual, and was not done in the exercise of ordinary care for his own safety; and if the jury believes from the evidence under the instructions of the court, that notice or knowledge of deceased's intention to do what he did, as you find it from the evidence in this case, came too late for the motorman, in the exercise of ordinary care, to stop said car before striking deceased, then the jury must find in defendant's favor."

This is a stock instruction and usually given. No other instruction presenting this proposition was given. Its refusal was prejudicial error. C. U. T. Co. v. Browdy, 206 Ill. 615.

Instruction XII offered by defendant and refused is in substance like refused instruction IX, and if the latter instruction had been given it might not have been error to refuse instruction XII. The same might be said as to refused instruction II. Defendant was entitled to have at least either instruction IX, XII or II given.

There was no ground for refusing to give instruction I offered by defendant as follows:

"I. You are instructed that if there is an inherent improbability in the statement of testimony of a witness that you may disregard it even in the absence of any direct conflicting testimony."

This went to the testimony of plaintiff's companions that they had looked for approaching cars before crossing the tracks and saw none. Such an instruction was a correct statement of the law and should have been given. Stephens v. Hoffman, 275 Ill. 497; Kuehne v. Malach, 286 Ill. 120.

Defendant's instruction III, which was refused, is as follows:

"III. The mere happening of the accident in question does not of itself raise a presumption of negligence on the part of the defendant."

Such an instruction has been approved and is usually given. Barnes v. Danville St. Ry. & Lt. Co., 235 Ill. 566. The refusal of a similar instruction has been held reversible error. Sandberg v. C. Ry. Co., 191 Ill. App. 199.

Counsel for plaintiff indulged in improper argument to the jury in his criticism of the conduct of a nurse, a passenger on the car, who testified on behalf of the defendant. Counsel for defendant attempted by testimony to explain the nurse's conduct, but the court would not permit this. Under the circumstances it was improper to permit plaintiff's attorney by innuendo to attempt to prejudice the jury against her.

It was prejudicial error for plaintiff's counsel to refer to plaintiff's family as "these poor people." Foster v. Shepherd, 253 Ill. 164, is applicable. References to the financial condition of the family in such cases have been strongly condemned. Jones & Adams Co. v. Gearan, 227 Ill. 64; McCarthy v. Spring Valley Coal Co., 232 Ill. 473. Striking out the word "poor" could not cure the error. Angel v. J. C. Ry. Co., 259 Ill. 561.

Other prejudicial errors which occurred on the trial are presented, but they are not likely to occur again.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

384 - 30237

TUCKER BARNY, Administrator of Estate of ALEXANDER BARNY, Deceased,
Appellee,

vs.

C. W. K. JOHNSON et al. On Appeal of C. W. K. JOHNSON,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 666

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, Johnson, appeals from a judgment of $166.66 had by plaintiff in a suit for rent.

Under lease dated December 8, 1921, plaintiff demised the premises in question to L. Hughes and A. E. Guhr, the lease expiring April 30, 1924, at a rental of $166.66 a month. The lease described the lessees as doing business as the Eagle Extract Company. In July, 1923, defendant, Johnson, acquired a two-thirds interest in the Regal Products Company, which had acquired the assets of another corporation, to which Hughes and Guhr had sublet the premises, and for a time the Regal Products Company paid the rent directly to the lessor.

As the term of the lease approached its end, it is evident that Johnson and Hughes desired to remain in the premises as lessees at the same rental and conditions, and on January 10, 1924, they and the lessor executed an agreement in writing, which recited that the lease which expired April 30, 1924, was thereby extended for a period of two years, all of the terms and conditions of the prior lease to be in full force and effect and the rental to be $166.66 a month. This was executed under the seals of the lessor and of Johnson and of Hughes, and attached to the first lease. Johnson personally occupied the premises and paid rent to the lessor for approximately six months under this new agreement.

530.1/.068

This suit is for rent for December, 1924, and it is in evidence that there was merchandise marked with Johnson's name on the premises in this month.

This was not an assignment of the first lease, but was a new lease wherein the parties, by reference thereto, adopted the conditions of the first lease. It is not ambiguous in its terms, and parol evidence was not admissible for the alleged purpose of showing the intention of the parties to be otherwise than as expressed in the instrument.

Even if Johnson in signing the lease was acting as agent for the Eagle Extract Company, he executed it under seal in his individual capacity and will be bound thereby. Tribune Company v. Wendell, 192 Ill. App. 639.

No sound reason is presented for reversing the judgment, and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

418 - 28835

VASILIKI CHRYSOSTHENOUS,

Appellee,

v.

JOHN BARALES,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

239 I.A. 666

Opinion filed Dec. 2, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, in which the plaintiff sought to recover $500 which she alleged she had turned over to the defendant for safe keeping and which he had failed to return to her upon demand. The defendant admitted receiving the money but alleged in his affidavit of merits that he had returned it to the plaintiff and that he owed her nothing. The issues thus formed were tried before a jury and a verdict was returned finding the issues for the plaintiff and assessing her damages at the amount sued for. Judgment for the plaintiff was entered for that amount and the defendant has perfected this appeal therefrom.

It appears from the record that the defendant acted as janitor of a Greek church and school, and that he had the confidence of the officers of those institutions to the extent of having custody of the safe in which their funds were sometimes kept and that he had a key to that safe. The plaintiff became a teacher in the school in thespring of 1921, coming to Chicago from some place in Ohio where

Opinion filed Dec. 3, 1925.

she had a brother living. It appears further that when she left Ohio this brother advanced $100 to her and after she had been in Chicago some time, she, in the month of April 1921, wanting to return the $100 to her brother, turned over that amount in cash to the defendant in exchange for his check for a like amount, and she then sent the defendant's check to her brother, and it was ultimately paid.

The plaintiff testified that about ten days after that transaction she gave the defendant $300 in cash for safe keeping. She had been keeping it in the drawer of her desk and she testified that the defendant advised her to put it in a safer place. She further testified that she knew he had a key to the safe of the church and she asked him to put her money in the safe. The testimony given by the plaintiff further shows that shortly after that, she desired to send $300 to some relatives of hers in Europe, and she asked the defendant for the money he had in the safe for her, and he explained that he had not put it in the safe but that he had put it in the bank and that he would not be able to withdraw it from the bank until after a period of six months; apparently, in order to avoid losing interest on it. She testified that at that time the defendant exhibited a bank book to her where she saw, on the right side of the page shown her, the figures "350.00"; that when she saw that amount she remarked that she had only turned over $300 to him, whereupon, he explained that when he deposited her money in the bank he added $50 of his own money to the deposit.

So far as the record shows, nothing further happened

until July 1921, at which time, the plaintiff testified, she had $300 more in her possession, in cash, and, desiring to send that over to Europe to her relatives, she turned it over to the defendant in exchange for two checks of his, one for $200 and the other for $100; and these checks were sent by the plaintiff to her relatives and they ultimately were paid.

The plaintiff further testified that in the following September she turned over $200 more to the defendant for safe keeping, asking him to put it in the church safe and not in the bank. About the first of October the plaintiff concluded to go back to Ohio and she then asked the defendant for her $500, and he again explained that he had deposited it in the bank and that when he had the chance he would get it for her. He suggested that it would be all right for her to go to Ohio, and he promised that if she did, in about a month he would send her money. It seems that this did not satisfy her and she complained about the matter to one of the church officers, whose name was Yiannakopoulos, and he suggested that she get the defendant to sign a judgment note. He drew up two judgment notes, each for the sum of $500; one being a demand note and the other a thirty day note, and the plaintiff took these notes to the defendant. On that occasion the defendant told the plaintiff that he was going to lose his position if she complained to the church officers "about this case of ours that I really owe you money." The plaintiff testified that she told the defendant that if he was in earnest about paying the money back to her she could not see why he did not give her a note, whereupon, he told her that he would sign a note under certain conditions, which were that he would

sign one of the notes with an endorsement on the back of it showing a payment of $300, which she was to take and show to the church officers, "so they believe I am an honest man and that I am intending to pay you," after which she was to return to him with the note; and the conditions further suggested were that she was to sign the other note containing a similar endorsement, which she was to leave with him until she came back with the note he was to give her, whereupon they were to destroy both notes and the situation was to be left as it had been, she relying upon his verbal assurance that he would pay her the money. The plaintiff testified she complied with those conditions and did as requested and that when she returned to the defendant, after having shown his note to some of the church officers, the defendant seemed to indicate an unwillingness to destroy the note he held, whereupon, she snatched it out of his hand and tore it up and at the same time tore the defendant's note which she held, in two parts, and threw the remains of both notes into a waste paper basket; and that she later recovered the two parts of the defendant's note and pasted them together. This restored note was introduced in evidence. She testified that he had never paid her any part of the $500 sued for.

The plaintiff called the defendant under section 33 of the Municipal Court Act and asked him if he had ever had a savings account in the Atlas Bank and he said he had not. Later, the plaintiff called as a witness an assistant cashier of that bank, who produced the records, showing that the defendant did have a savings account there and that in

April, 1921, his balance in that account was $350. One Nomikos testified that he was a trustee of the Greek Church and school at which the plaintiff had been employed as a teacher and the defendant as a janitor. He testified that sometime in thelate summer or fall of 1921 he had a conversation with the defendant, in which the latter asked the witness for $500, saying that he wanted to pay the money to the plaintiff, Mrs. Chrysosthenous, and that the witness did not have the money available and so he took the defendant over to the Washington Park Bank, where he endorsed the defendant's note for $500, and the defendant procured that amount from the bank. The defendant denied that he had asked Nomikos for this loan so that he could pay the plaintiff what he owed her, but testified that "the only loan I wanted to get from him was for the purpose of building my home."

The plaintiff's brother, John Nichols, testified that he gave his sister $100 before she left Ohio and that sometime in the latter part of 1921, she paid that money back to him by means of a check signed by the defendant. He further testified that payment of this check was stopped; and he wrote his sister about it and later received a letter from the defendant, in which he said his checks were perfectly good and "I don't want you to bother about it any more." The defendant denied the testimony of this witness, saying that he never wrote a letter to the plaintiff's brother in Ohio, about the hundred dollar check.

One Petropulos testified that he was a singer at the Greek Church in question and that some time in April, 1921,

he had a conversation with the defendant, in which the latter remarked that the plaintiff had been complaining to the board in charge of the school, that she could not get along on the salary they were paying, and asking for more money, and added, "but she gave $300 to put in the bank for today * * * I want to show, Petropulos, it is cry every day for money. She got lots of money." The defendant also denied that conversation, explaining that he had had a quarrel with this witness sometime before because the witness lost his position as a singer in the church and thought the defendant was the cause of it.

One Caravasos testified that he had had a talk with the defendant about a year previous to the trial, in which he told the defendant that both he and the plaintiff were his friends and that rather than air their troubles in court, he would like to see them get together and settle the matter; and that the defendant replied that he would come around to see him the following week and settle the case. His testimony was admitted over defendant's objections.

The plaintiff also introduced in evidence an affidavit of merits, which the defendant had filed in this case, in which he admitted that he had received $300 from the plaintiff in the month of April, 1931, and $200 in September of that year; and denied that he had ever refused to return it to her, but alleged that he had paid it all back. Plaintiff further read in evidence the affidavit of merits which the defendant later filed in the case, and on which the issues tried by the jury were made up, in which

he admitted that he had received the sum of $300 from the plaintiff, "but not in the month of April 1921, as previously stated by the plaintiff, but in the month of July 1921, the remaining allegations in this affidavit being the same as in the preceding one. The defendant testified that he never put any of plaintiff's money in the bank. He denied receiving $300 from her in April which he had failed to return to her. He contended that he had paid back all she had given him for safe keeping. We have already referred to parts of his testimony.

In support of his appeal the defendant contends that the plaintiff failed to prove her case by a preponderance of the evidence. We shall treat this contention as one being to the effect that the verdict and judgment are against the manifest weight of the evidence. In our opinion, such is not the case. The defendant contradicted the testimony of practically every other witness in the case. If he told the truth in his testimony, all the others must have committed perjury. The jury saw the witnesses and had every opportunity to observe their appearance and manner of testifying, and make up their minds as to who was telling the truth. The jury, having concluded that the plaintiff and all her witnesses were telling the truth, and the defendant was not, we are unable to say that the jury was not right about it.

It is contended that the trial court erred in permitting the plaintiff to introduce the two affidavits of merits in evidence, and in support of that contention the case of Woodsmall Construction Co. v. Hall, 198 Ill. App.

250 is cited. That case is not in point. It involved successive affidavits of merits presenting different grounds of defense to the claim there sued upon, some of which were inconsistent with others. In the case at bar one affidavit expressly admitted the receipt of $300 from the plaintiff in April 1921, and the other denied it. These were not inconsistent theories of defense, they were inconsistent admissions of fact. In our opinion, the trial court properly admitted them in evidence. Bartlow v. C.B.& Q. R.R. Co., 243 Ill. 333; Daub v. Englebach, 109 Ill. 267; People Bank v. Wood, 207 Ill. App. 602; Soape v. Richberg, 42 Ill. App. 375.

The only other error complained of was the action of the trial court in admitting the testimony of the witness Caravasos, referring to the matter of a settlement. Ordinarily testimony of this character is incompetent. At the time it was given, we are of the opinion the trial court should have sustained the objections interposed to it by the defendant, although it might have been proper in rebuttal as a direct contradiction of the defendant's position taken on the trial. We are further of the opinion, however, that any error there may have been in admitting this testimony is not such as would warrant this court in disturbing the judgment appealed from. On this record we are unable to see how any other conclusion than the one arrived at by the jury on the trial which has been had, could be reached.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

427 - 29844

NATIONAL GLASS CO., a corp.,
Appellee,

v.

JENNIE COOPER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 666

Opinion filed Dec. 2, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, National Glass Co., brought this action of the fourth class, in the Municipal Court of Chicago, claiming $900 damages occasioned by the breaking of a quantity of plate glass, in a collision between one of their trucks and a touring car owned and driven by the defendant. The trial was had in the Municipal Court before a jury, and at the conclusion of the presentation of all the evidence, the court instructed the jury to find the issues for the plaintiff and assess its damages at the sum of $762.40. The jury returned a verdict pursuant to that peremptory instruction, and the court entered a judgment for the amount of the verdict. To reverse that judgment the defendant has perfected this appeal.

The collision between the plaintiff's truck and the defendant's automobile took place at the intersection of Kedzie and Lawrence avenues in the City of Chicago, about four o'clock in the afternoon, on May 3, 1922. It was a nice bright day, according to the testimony, and apparently the streets were dry. There is a double track street railway on both Kedzie avenue and Lawrence avenue. The plain-

Ontario Hydro
Dec. 9, 1986.

tiff's truck was being driven south in Kedzie avenue, in the southbound car track and the defendant's automobile was being driven west in Lawrence avenue, with the left hand wheels between the rails of the west bound car track. The plaintiff's truck was struck by the defendant's automobile at the rear left hand wheel.

One Noland, testified that he was a police officer assigned to duty as a traffic officer at the intersection in question at the time of this occurrence; that a Ford truck was going south in Kedzie avenue a little ahead of the plaintiff's truck, and as this Ford truck came along the driver asked him for an address he was looking for, and he stepped aside to tell him; that he gave one whistle for the north and south traffic to proceed, and after telling the driver of the Ford truck what he was wanting to know, he turned around and saw the defendant's car collide with the rear wheel of the truck, the latter vehicle being between the two street car tracks on Lawrence avenue; that he did not see the defendant's automobile at all until it was just colliding with the truck. On cross-examination, this witness was asked whether he remembered talking to a man named Jones, some time after this occurrence, and telling Jones that he was not an actual eye witness, and he answered that some man had come up to see him and said he was the defendant's husband and asked him whether he saw the occurrence, and he said, "Yes," and he then asked how it happened, and the witness said he told him he would not say anything about it. He was then asked whether he told this man, in that conversation, that he arrived on the scene of the accident sometime after the col-

lision took place, and he answered that the only thing he told him was that if the lady who was driving that car was his wife, he had better keep her away from it and not let her drive anymore. He was then asked whether he did not say to this man that he arrived on the scene after the collision; this conversation being on or about June 13, 1932, and he said he did not. One Martin was the driver of the plaintiff's truck. He was not in the plaintiff's employ at the time of the trial of the case. He testified that he approached Lawrence avenue, driving south in Kedzie avenue, and that there was a police officer directing the traffic on the corner, and when he was within 50 feet of the intersection, he blew his horn and the officer motioned for him to go ahead, and blew his whistle. He further testified that he was 5 feet south of the eastbound track on Lawrence avenue, when the defendant's car ran into the rear wheel of his truck, and he stopped the truck within 10 feet. He said he was going about 10 miles an hour at the time. On cross-examination this witness said there was no east and west traffic that he knew of at the time of this occurrence, but that there was a truck going south in Kedzie avenue, about 100 feet ahead of him. He was asked whether that truck stopped at any time previous to the collision, and he said it did not. He was next asked where the police officer was when he first saw him, and he said he was standing on the southwest corner, talking to a driver, and at this time his truck was within 50 to 75 feet of the corner. This witness was further asked, on cross-examination, if he knew whether the officer that was on the corner had a conversation with

the driver of the truck that was ahead of him, and he answered, "No sir, not that I know of."

One Meyers, a glazier in the employ of the plaintiff, testified that he was on the plaintiff's truck at the time in question, sitting in front with the driver; that he saw the police officer on the corner, and he gave one whistle. He testified that he did not see any cars going north at this time, nor did he see the defendant's automobile previous to the time of the collision. On cross-examination he testified that there was a truck some distance ahead of them, going south, and he said it stopped at the corner of the intersection; that the plaintiff's truck slowed up approaching the corner, the officer gave the whistle signal and they went ahead.

One Kreer, a glazier in the employ of the plaintiff, was standing in the center of the truck at the time in question, and he testified that the collision took place when the truck was about in the center of the intersection. He also testified that the crossing officer was there and he heard him blow his whistle once. He testified "When I first saw the police officer the truck was standing on the north side of Lawrence avenue waiting for the orders to go south." On cross-examination this witness testified that he did not see any truck going south on Kedzie avenue ahead of them and that when he first saw the officer he was standing "near there at the corner where he usually stands"; and that he did not see him talking to anybody on a truck ahead of them. This witness further testified, on cross-examination, that when he first saw the defendant's car it was about 25 feet away, and that the truck stop ed a few steps from where it was hit.

For the defendant, one Jones testified that in May 1932 he was an investigator for the Chicago Motor Club, and in that capacity he investigated this collision and in that connection called upon the policeman Roland and talked with him about the occurrence. This witness was asked whether, in that conversation, Roland told him he did not see the collision. He was also asked whether or not Roland stated that he arrived on the scene of the accident some time after it had occurred. Objections to both of these questions were sustained. This was error, for the questions were entirely proper and the objections should have been overruled. These questions were asked this witness in an effort to impeach the officer and contradict his testimony, andfrom what has been set forth above, in connection with his testimony, it will be seen that a proper foundation had been laid for them.

A woman named Mrs. Levy was riding with the defendant at the time of the occurrence in question and was sitting at the defendant's right in the front seat. She testified that as they approached Kedzie avenue there were four cars standing in Kedzie avenue, facing north on the south side of Lawrence avenue, "waiting to go through;" that an Overland car passed west in Lawrence avenue and crossed Kedzie ahead of the defendant's car, - "It was just about as far ahead as this room is wide, maybe a trifle less;" that when the defendant approached Kedzie avenue she slowed her car down; that she had been driving at the rate of about 15 miles an hour before reaching Kedzie avenue; that when they saw the Overland car proceed across Kedzie avenue ahead of them, going west, the defendant "put the gas on, and as we got to the center this truck came from the north." She further testified that

at the time of the collision there was no police officer at the corner, but that he came up to her about three minutes after the collision. She further testified that as she and the defendant came up to Kedzie avenue, the truck was not in sight, but she saw it as it came across, before the cars collided. She said that no other traffic had crossed ahead of them, going south on Kedzie avenue, before the plaintiff's truck came along. On cross-examination she testified that when she first saw the truck it was two or three feet from the street car track; that the defendant had pulled up on the east side of Kedzie avenue and "the traffic seemed to be open with the cars going ahead, and we went on." She was asked whether the defendant had proceeded across Kedzie avenue "without the signal from the policeman," and she answered, "There wasn't any policeman there."

The defendant, Mrs. Cooper, testified that as she approached Kedzie avenue she was driving with two wheels in and two wheels to the north of the westbound track; that she saw cars facing north, on the south side of Lawrence avenue, and she started across Kedzie avenue; that she saw no policeman there and heard no whistle; that she had blown her horn as she approached Kedzie avenue; that when she first saw the plaintiff's truck the front of it "got across the crossing after I had gotten out on the crossing and I couldn't see him. I looked to the right and left. I started on the crossing and I couldn't see him until he shot out behind the other machine." We can find no other place, either in her direct or cross-examination, where she makes any further reference to this other machine, and apparently she was asked nothing further about it. She

was asked who got to the intersection first, and she answered, "I imagine he did, I hit him in the rear axel." She testified that when she came across, the driver of the truck put on his brakes and did not stop until he had crossed the south curb line. She said she did not see the police officer until he came up to get their names and license number, and at that time she was arguing with the driver of the truck and the policeman remarked "Stop your arguing, you were both to blame;" that this occurred five minutes after the collision. On cross-examination she testified that the Overland car that preceded her across Kedzie avenue was about 45 feet in front of her, going about 18 miles an hour, and that that car had crossed the street when she reached the corner; that she did not stop at the corner but slowed up; that no policeman was there and no whistle was blown; and the only machine she saw, in any direction, was the one going west ahead of her. She testified that she thought the truck must have been going about 25 miles an hour.

This was all the testimony submitted, with regard to the collision. That this testimony submitted in behalf of the respective parties, on the question of the alleged negligence of the defendant and contributory negligence of the driver of the plaintiff's truck, was in sharp conflict, is apparent. We are clearly of the opinion that on this conflicting testimony those issues should have been submitted to the jury, and the trial court erred in giving the jury a peremptory instruction to find the issues for the plaintiff. There was testimony submitted in behalf of the defendant, tending to impeach the testimony of the police officer.

Considering that testimony, together with the testimony given by Mrs. Levy and the defendant, there was testimony before the jury, tending to support the contention of the defendant, to the effect that this collision was not caused by her negligence. On the other hand, the testimony submitted in behalf of the plaintiff tended to show that it was caused by her negligence. In that situation, a peremptory instruction should not be given either way. It is not for the trial court to weigh the testimony of the witnesses. Where there is any substantial evidence, beyond a mere scintilla, tending to make out the plaintiff's case or the defendant's defense, the issues of fact presented should be submitted to the jury and not be passed upon by the court. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

Considereble testimony was submitted by the plaintiff on the question of damages, but as there must be another trial of this case, we have not commented upon it. As the testimony is presented in this record, it is not very satisfactory. There should be no difficulty in submitting testimony to show just how much glass was on this truck when it left the plaintiff's place of business, on the morning of the day of the collision; just how much of it had been removed, at the time of the collision, and just how much remained, and its value. As the testimony appears in this record, it would be very difficult, if not impossible, to check the testimony given as to the market value of glass of specific sizes, with the testimony as to the glass that was on the truck. It would seem that the testimony as to values, included considerable glass of sizes that is not to

be found in the testimony submitted as to the glass that was on the truck. This testimony, as to damages, can doubtless be submitted in better form on another trial.

For the reasons we have given, the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

436 - 29853

NATALE BI CARLO,

Appellee,

v.

GIACOMO MASCIO,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 666

Opinion filed Dec. 2, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Mascio, seeks to reverse a judgment for $216.40, recovered against him by the plaintiff, BiCarlo, in the Municipal Court of Chicago. It is contended that the judgment should be reversed because it is against the manifest weight of the evidence. The hearing in the trial court was before the court without a jury.

The plaintiff testified that he went to the defendant's home to talk with him about buying it, and that on that occasion Antonio Marcesi, whom he had known about 10 years, and Fiori Marcesi, whom he had known about a year, accompanied him. He further testified that on this occasion the defendant agreed to sell the premises to him for $9,000 and he agreed to buy them at that figure; that at the defendant's request he made a payment of $300 at that time to apply on the purchase; and that the defendant gave him a receipt for it, and said that if the plaintiff concluded not to buy the premises, he, the defendant, would return the $300. He further testified that he did not

Opinion filed Dec. 8, 1925.

carry out the purchase of the property and asked the defendant to give him back his money, and the defendant offered to split the difference and pay him $150, but refused to give him back the $300. The plaintiff said he refused to accept the return of $150. He further testified that he paid this money over to the defendant in the presence of his two friends who had accompanied him to the defendant's house.

Both of the plaintiff's friends were witnesses for the defendant. Fiori Marcesi testified that she had known the plaintiff for a long time but met the defendant for the first time when she accompanied the plaintiff to his house upon the occasion referred to in the plaintiff's testimony. She testified that the plaintiff had told her he wanted to buy a house and asked her to let him know if she saw one for sale; that she told him of one next to her mother's home, which he did not buy, and later she told him of seeing a "For Sale" sign on the defendant's premises, and she and her brother-in-law accompanied him when he went to see the defendant. She testified that when they arrived there the defendant showed them through the premises and the plaintiff inquired the price. The defendant stated it was $9500 and the plaintiff asked if he could not make it less and the defendant then said that if there was not going to be any real estate commission to pay, he would make it less, and they finally agreed on a price of $9000. There were two mortgages on the premises and this witness testified that the defendant agreed to deliver the property subject to the first mortgage only. She further testified that the defendant asked the plaintiff to prepare a contract

and the plaintiff replied that he would bring his lawyer over the following night, and they agreed on the payment of $300 then and there and that the plaintiff agreed to pay $700 more the following evening when he called with his lawyer, making a payment of $1,000 down. She further testified that when the plaintiff paid his $300 to the defendant he agreed that if he concluded not to buy the property the defendant was to retain that money, but if the defendant failed to carry out his agreement to sell at the price agreed upon, he would have to pay the plaintiff $600. This witness also testified that the plaintiff was to come over to her house on the following evening before going to the defendant's house, but that he did not appear the next evening, but he did come on the following Sunday, with his son and a nephew or cousin, and they all went to the defendant's house, where the plaintiff and his son looked through the property and the plaintiff then said he did not want to buy it and asked for the return of his $300, and the defendant declined to return it, reminding the plaintiff that he had agreed to forfeit it if he failed to carry out his purchase. This witness also testified that the plaintiff told her that he concluded not to buy the place because he found it was near the home of a sister of his and he didn't want to live near her. She was asked if she was to receive a commission for bringing the plaintiff and the defendant together and she said that she was not to be paid anything by the defendant but that the plaintiff had told her that if she found a place he would give her something for her services.

Tony Marcesi testified that he had known the plaintiff about eleven years and the defendant about a year, and that he was present at the time the plaintiff called on the defendant to negotiate for the purchase of this house; that he and the previous witness went over to the defendant's house with the plaintiff on that occasion. He further testified that he saw the plaintiff make a $300 payment at that time and heard him say that he would return the following night and make a contract and pay $300 more, and "if I may not want to buy house, you keep that; if you don't want to sell you must double the deposit," meaning that in that event the defendant would have to pay double the amount of the deposit if he failed to carry out his agreement to sell. The witness further testified that $500 was the amount to be paid as an initial payment, and the plaintiff said he had $300 in his pocket and would bring the remainder the next night.

The defendant testified that he never met the plaintiff before he calledto buy his house with the two witnesses who had previously testified; that he showed them over the property and they agreed on the price of $9,000 and the plaintiff paid him $300 at the time and promised to bring $700 the following night, at which time he would have his lawyer with him and they would make out a contract. He further testified that plaintiff did not return until Sunday, when he announced that he was not going to buy the place, as he did not like it, and on this occasion he asked the defendant to return his money; and the defendant said that he replied, "You say if you don't buy I keep the $300,

and I give you $500 if I don't give you my house." The defendant further testified that he declined to return the $500 to the plaintiff; that before the plaintiff returned and said he was not going to carry out the deal, the defendant had borrowed money and paid off the junior encumbrances on the property, amounting to $1100; that he borrowed the money for this purpose at a bank on sixty day note, and that it was going to be necessary for him to put a new second mortgage on the property in order to take up his note at the bank, in view of the failure of the plaintiff to go through with the purchase of his property.

At the conclusion of this testimony the trial court found the issues for the plaintiff and fixed his damages at $816.40, which was arrived at by allowing the defendant credit for the expense he had gone to in getting the premises ready to convey to the plaintiff.

In support of his appeal the defendant contends that the record shows that the plaintiff, in the trial of this case, failed to meet the fundamental requirement that a plaintiff must establish his case by a preponderance of the evidence, in order to recover. In support of that contention, the defendant points out that theonly testimony for the plaintiff was his own, while that of the defendant is supported by two "absolutely disinterested" witnesses. Defendant then argues that even if his testimony were unsupported by any evidence, the plaintiff could not recover because he necessarily would have failed to establish his case by a preponder-

ance of the evidence, citing Peaslee v. Glass, 61 Ill. 94. We have repeatedly had occasion to point out that "neither the decision in Peaslee v. Glass, nor even the dictum of the learned judge who wrote the opinion is ground for the declaration of any such universal rule," as that contended for by the defendant. First State Bank of Plano v. Isaacs, 231 Ill. App. 658; Sears, Roebuck & Co. v. Mears-Slayton Lumber Co., 226 Ill. App. 287. In our opinion it may not be said that the witnesses testifying for the defendant were entirely disinterested. The witness Flora Marcesi was expecting to be paid something by the plaintiff in case she found a place for him to buy. It further appears that she referred him to one place which he did not buy and then to the property of the defendant, which he also concluded not to buy. She also stated that she had some feeling against him, the plaintiff, not, however, because he did not carry out this deal but because he had made it necessary for her to come into court and testify, which was displeasing to her, - a situation which made her husband angry.

We have referred to the evidence showing that the defendant offered to return $150 to the plaintiff. The trial court deducted something from the $300 claimed by the plaintiff, which apparently represented some expense to which the defendant had been put by reason of the plaintiff concluding not to buy the property. The trial court had the advantage of seeing the witnesses and hearing them testify, and in view of all the circumstances, we are not disposed to disturb the judgment.

For the reasons stated, the judgment of the Municipal Court is affirmed.

TAYLOR AND O'CONNOR, JJ. CONCUR. AFFIRMED.

3966

449 - 23866

BLITZ BROS., a corporation,

Appellant,

v.

THADDEUS LAING,

Appellee.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

239 I.A. 667

Opinion filed Dec. 2, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Blitz Bros., sued the defendant Laing, in the County Court of Cook County, claiming that he had purchased a quantity of phonograph cabinets from the plaintiff for the sum of $900, and that he had received them but had failed to pay for them. To the declaration filed by the plaintiff, defendant filed a plea of the general issue. He was represented by two lawyers at that time, one of whom afterwards died, but the other continued as the attorney of record in the case until after judgment had been entered. It appears that the case was regularly reached for trial on February 28, 1924, at which time counsel for the plaintiff, with his witnesses, was in court ready for trial, but the defendant was not present nor was any counsel in court representing him, and in his absence the plaintiff made the necessary proof, and the court entered judgment against the defendant for the amount of the plaintiff's claim.

After the judgment term, namely, on March 26, 1924, the defendant orally moved to 'vacate and set aside the default and judgment' which had been entered against him, and on April

Opinion filed Dec. 3, 1956.

12, 1924, that motion was denied. Later, the defendant filed a written petition and still later an amended petition under section 89 of the Practice Act, seeking thereby to vacate the judgment, and on May 20, 1924, the County Court, pursuant to said petition, vacated the judgment. By this appeal the plaintiff seeks to reverse the order vacating the judgment.

In the amended petition filed by the defendant, under section 89, he alleged among other things, that the plaintiff had secured an order of default and had proceeded to take judgment against him when he was absent from the City; that on February 27, 1924, he telephoned the office of the attorney for the plaintiff, and had a conversation with one Walsh, who was an employee of the attorneys, and who was the agent of the plaintiff who executed the affidavit of claim attached to the plaintiff's declaration; that he told Walsh, in that conversation, that he was subpoenaed to appear as a witness, at a court at Rockford, Illinois and that Walsh then agreed to have this case continued, when it was called for trial on that day "and on subsequent occasions," until the defendant returned; and that the defendant, relying upon that agreement, went to Rockford and was absent from the City of Chicago until March 17, 1924; that immediately upon his return he found that Walsh, contrary to his agreement, had secured an order of default through his employer, the attorney for the plaintiff, and that he had not continued the case as agreed. In his petition the defendant further set forth that he had at all times conducted himself in a diligent manner, and he alleged that he was ready for trial when the case was called on January 23, 24, 30, February 5, 6,

7 and 26, 1924, on which occasions he answered that he was ready. Defendant further set forth in his petition that he had a good defense upon the merits to the whole of the plaintiff's demand; "that on October 1, 1924, he was retained by plaintiff as agent to sell certain phonographs upon a commission and received delivery of said phonographs, as agent advertised same, but being unsuccessful, informed plaintiff and, at its request, stored the same in a warehouse, taking a warehouse receipt in the name of Thaddeus Laing and sending same to plaintiff. Phonographs remained in warehouse about a year; that petitioner is informed that the warehouse man continuously requested plaintiff to pay storage, but plaintiff failed, whereupon warehouse man advertised and sold for storage charges." The defendant alleged further in his petition that "immediately upon hearing of the order of default and the rendition and entering of judgment" he employed a lawyer to represent him and to have the judgment vacated.

The plaintiff did not question the legal sufficiency of this amended petition under section 89, by filing a demurrer to it or by making a motion to strike it, but joined issue on it by filing an answer, which, among other things, set forth that the conversation defendant alleged in his amended position he had had with Walsh, did not take place. The plaintiff alleged in its answer that on December 31, 1923, the case was set for January 18, 1924, by agreement between counsel representing the respective parties; that on January 16, counsel for the plaintiff called up defendant's lawyer and asked if the latter would be ready for trial on January 18, and he re-

plied that he would not be ready as he wished to withdraw from the case and had requested the defendant to secure another lawyer; - this lawyer has never withdrawn from the case, and at the time of the filing of this answer still remained attorney of record for the defendant; that the case next appeared on the trial call on January 23, and thereafter on January 24, 30, February 5, 6, 7, 26, 27 and 28, 1924; that the plaintiff was at all times ready for trial and that the plaintiff's attorney directed his clerk, Walsh, to attend the court call and watch it and announce the plaintiff ready for trial; that Walsh had no authority to make any agreement with regard to a continuance or otherwise; that when the case was reached for trial on February 7, defendant asked for a continuance, in order to procure another lawyer and the court continued the case to February 20, for that purpose; that there was no trial call on February 20, and the case next appeared on the call on February 25, but was not reached for trial; that the defendant appeared in court and answered that he was ready; that on the next day, February 27, the case was reached for trial but put over to the following day, February 28, on which day the case was heard and the judgment was entered in favor of the plaintiff. It was further alleged by the plaintiff in its answer that on the morning of February 27, the defendant telephoned Walsh, in the office of the plaintiff's lawyer, and asked him to continue the case as he had to go to Rockford, but Walsh refused to do so; that when the case was reached for trial in court on that day the plaintiff's lawyer stated to the court the telephone request for continuance made by the defendant, and the refusal to continue, by the attorney for

the plaintiff, and the court continued the case to the next day; that on the following day the judgment was entered and some time later a lawyer, representing the defendant requested the plaintiff's lawyer to vacate the judgment and the latter declined to do so. These pleadings contained other allegations which need not be set forth here.

On the issue thus joined by the allegations of the amended petition of the defendant and the answer of the plaintiff thereto, the trial court heard testimony. The defendant testified in substance to the facts as he had alleged them in his amended petition. In the course of his cross-examination he testified that his lawyer told him he wanted to withdraw from this case and that he had another lawyer that was coming in as soon as the case was ready for trial. He further testified that he consulted his new lawyer the first part of February but did not ask him to enter his appearance in the case. He testified further that the first thing he did after returning to Chicago and learning what had happened, was to employ a lawyer to represent him. The lawyer for the plaintiff and his employee, Walsh, testified forthe plaintiff and their testimony was such as to support the facts alleged in the answer filed by the plaintiff in response to the defendant's amended petition. It will not be necessary to make further reference to this testimony.

Neither the facts alleged by the defendant in his petition nor the testimony given by him in support of the petition, were sufficient to warrant the vacating of the judgment entered, under section 89. Even if we assume that the defendant set up sufficient facts to show a meritorious

defense, which is very doubtful, we are of the opinion that it is entirely clear, from the defendant's own allegations and testimony, that he was not diligent. His lawyer, whose appearance was on file in the case, had notified him that he desired to withdraw and, on several occasions when the case was called for trial, that lawyer was not present but the defendant was present. On one of these occasions the case was put over so that he might secure a new lawyer, and he admits, on cross-examination, that about that time he did consult a new lawyer but did not request him to come into the case then and file his appearance, - his plan seeming to be to bring the new lawyer into the case when it was going to be necessary to try it. Even if the conversation which the defendant claims he had with Walsh, occurred, he was not warranted in deliberately leaving the city, with the knowledge that he had no lawyer looking after the case for him.

We have recently had occasion to pass on a very similar situation in the case of F. M. Paint Co. v. Lagocki, Ill. App. Ct., case No. 30002; opinion filed October 28, 1925, not yet reported:- that case, arising under section 21 of the Municipal Court Act. As we there said, quoting from American Surety Co. of N.Y. v. Bliss, 214 Ill. App. 463, "Judgments will not usually be set aside upon charges of broken oral agreements, long after the expiration of the period of time for so doing specified in the statute, where such charges are directly denied and where it is apparent that the rights of one complaining thereof might easily have been protected byba written stipulation of counsel."

Neither in his amended petition nor in his testimony

does the defendant show any error of fact such as would justify the vacating of the judgment under section 88. What those errors are have repeatedly been set forth in the decisions. Marabia v. The Mary Thompson Hospital, 309 Ill. 153; Chapman v. North American Insurance Co., 292 Ill. 179. Harris v. Chicago Wrecking Co. 314 Ill. 500; Cramer v. Commercial Men's Assn., 360 Ill. 516.

For the reasons stated the order of the County Court, vacating the judgment against the defendant, is reversed.

ORDER REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

461 - 29678

SELMA BRINKMAN,

Appellant,

v.

HENNISON BARTEL, ET AL,

Defendants,

J. P. GEHL,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 667

Opinion filed Dec. 2, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Selma Brinkman brought this action against the defendant Gehl, and two others as indorsers on two promissory notes, one for $26,000 and the other for $4,000, both due on demand. There was a trial resulting in a verdict for the plaintiff. A new trial was awarded and in the course of the second trial a juror was withdrawn and the case continued. Before the issues were submitted to the jury on the third trial, the defendants, other than Gehl, had been eliminated and the issues were submitted to the jury as to Gehl alone. The jury found the issues for him. A judgment in his favor followed, to reverse which the plaintiff has perfected this appeal.

It appears from the record that one Bartel, a lawyer who had known the plaintiff's husband during his lifetime and who at the time of the events involved in this case was the plaintiff's lawyer, was engaged in the automobile

Opinion filed Dec. 3, 1952.

business with several others, including the defendant Gehl, one Megerle and the plaintiff's son. At first this business was not incorporated but in April 1930, it was incorporated under the name of Megerle-Brinkman Co. Bartel became the president of the Company, the defendant Gehl the vice president, and the plaintiff's son the secretary. It further appears from the record that the plaintiff put various sums of money into the Company, from time to time, until these sums came to aggregate $30,000. She held the company's ninety day notes for that amount, and she testified that there was a director's meeting of the company in October 1930, at the company's place of business on Michigan avenue in the City of Chicago, and that she attended that meeting and there met Bartel, the president, and the defendant Gehl, the vice president. Her notes were due and she demanded her money; and she testified that they told her they didn't have any money. She told them that she needed the money to live on and she testified that Gehl told herthat he had no money then but that he had a law suit pending against the Carnation Milk Company and he expected to get $17,000 out of that, and as soon as he did he would pay the notes. She testified that on that occasion they gave her two new notes, these being the notes sued upon in this case, and they made out one of the notes for $26,000 and the other for $4,000 because she was in need of some money as soon as possible and they expected to be in a position to take up the $4,000 note shortly after that. When she received these new notes she surrendered the old ones. The notes were signed, "Megerle-Brinkman Co., by Benjamin F. Bartel, President." The defendant's indorsement appeared on the back of the notes. The

plaintiff testified that the notes were signed by Bartel and indorsed by the defendant in her presence and that Bartel then handed them to her.

The plaintiff testified further that there was another director's meeting of the company held at the law office of Bartel, the president, in January 1931, and that she was called to attend that meeting by Bartel. She said that both Bartel and the defendant were present at that meeting, as well as her son and her daughter, a Mrs. Ball. She also testified that a conversation took place on that occasion, with reference to her two notes; that Bartel stated that the automobile business of the Megerle-Brinkman Co. was "$12,000 in the hole;" that she then asked, "What about my notes, and what about this money?" that Bartel then said, "Nobody is getting any money. Don't bring in those notes;" and that the defendant Gehl then assured her that "as long as John P. Gehl is here I will pay those notes," and that he added, turning to Bartel, the president, "This is not the way to speak to Mrs. Brinkman."

On cross-examination the plaintiff was asked whether she did not remember that she was one of the holders of the capital stock of the Megerle-Brinkman Co. and she answered, "No, I never bought stock. I didn't pay anything for it, there was nobody to pay anything for it." The company finally failed and went into bankruptcy, and the plaintiff admitted on cross-examination that she appeared before Referee Eastman as a witness and testified that she had paid $5,000 for stock in the company and $5,000 for her son's stock, and had loaned Megerle money to pay for his stock and

that the aggregate of $14,000 used for that purpose was part of the $30,000 that the company owed her. On re-direct examination she testified that before she went to the office of Referee Eastman, upon the occasion of giving the testimoney referred to above, she was told by Bartel, in the presence of the defendant Gehl, that if she did not testify as they wanted her to, she would lose all of her money, and that she was not to show these notes; that Bartel told her what she was to say at the hearing, and "whenever he would look up it meant yes, and when he looked down it meant no; I was to watch so he should tell me."

This witness identified some of her checks, drawn to the order of the company, and stated they were given so that the company might secure possession of some automobiles that were to be sold. She testified that in connection with some of these checks, she received warehouse receipts which she later turned over to Bartel. She also testified "We were all supposed to have stock, nobody was supposed to pay anything, that was the understanding. I am not acquainted with any of those affairs. Mr. Bartel has fixed all those things to suit himself." She also testified that the only attorney she had representing her at that time was Mr. Bartel. She testified further that before she went to the referee's office, in the course of her talk with Bartel he told her she was going to be asked about paying $5,000 "on each of the stocks and I was to say yes. He tried to make me believe I had subscribed for $5,000 worth of stock. He told me to say yes * * * In this hearing before the referee, Oh, yes, he told me to say, - to tell about the $5,000 and that I loaned to pay for Mr. Gehl, -

Mr. Megerle, and I never did, nobody was supposed to pay anything for stock. I don't know how that was fixed. Mr. Bartel has fixed that all himself."

The plaintiff's daughter, Mrs. Hall, testified that she was present in Bartel's office, in the Tribune Building in Chicago, in January 1931, at the meeting referred to by her mother in her testimony, and she corroborated the testimony given by the plaintiff, relating to the conversation she had with Bartel and Gehl at that time about her notes. This witness also testified that Bartel had been her father's attorney before his death.

The plaintiff's son, William F. Brinkman testified that he was present when the notes sued upon were signed and delivered to his mother, upon her surrendering the ninety day notes which she held at that time. He also testified that he was present at the meeting in Bartel's office "just before the show of 1931," and he corroborated the testimony of his mother and sister as to the conversation which took place at that time, between his mother and Bartel and the defendant Gehl. It is quite apparent from the cross-examination of this witness that he was a "dummy" secretary. He testified that he was "given the name of secretary of the company;" that he had to go out and sell cars "in the territory;" that he countersigned checks in advance; that he never kept minutes of meetings; that he never had custody of the corporate seal or the corporate minute book or of the stock certificate book; that he had seen the corporate seal "but Mr. Bartel always kept these. I never sealed anything. I never saw the seal on anything, that was all done when I was asked to sign 'right here' * * *, I never had anything

to do with the books, - never was allowed to. Mr. Megerle had charge, under Mr. Bartel's direction, of the books. They both worked them together. Mr. Megerle was the treasurer * * * I had to go out into the territory to open up the different agencies * * * that was my job. I was away three weeks at a time * * *. At times I signed notes for the corporation." The witness was shown several notes of the company bearing his signature as secretary, which were issued at thesame time plaintiff's notes were issued.

The defendant Gehl testified that he was the person whose name appeared on the back of the plaintiff's notes and that he remembered the meeting at the office of the company, in October 1920, when these notes were signed; that business had not been very good and the company had lost money and Mrs. Brinkman "wanted to have something to show how much money she had invested in the automobile business, - that was the trend of the argument;" that some new notes were made out at that time "to represent the amount of money she had invested in the Megerle-Brinkman Co.;" that he asked Bartel "what this was for and he said these two papers represent the amount of money that Mrs. Brinkman had invested in the Megerle-Brinkman Co." This witness testified that he also had invested money "like Mrs. Brinkman," and that after her notes "were completed" he asked Bartel, "Now what have I got to show for what I have invested in the Megerle-Brinkman Co.?" and that he was then given some notes to represent the $14,000 he had paid into the company from time to time. This witness denied the conversations testified to by the plaintiff. He said nothing had been mentioned about

a suit he had against the Carnation Milk Company, but he admitted he had a lawsuit with that company and that Bartel was his lawyer in that case. This witness testified that he was present at the meeting held in January 1931, in Bartel's office, as testified to by the plaintiff and her son and daughter, all of whom the defendant said were present at that meeting, but he denied that there was any conversation there as testified to by the plaintiff and her witnesses. The defendant maintained on direct examination that his only connection with the company was as an investor, but he admitted on cross-examination that he was the vice president of the company.

Bartel testified that he was the president of the Megerle-Brinkman Co. and that he wrote out the body of the notes held by the plaintiff. He testified that at the October meeting, referred to by the plaintiff, they discussed the amount of money that was invested in the business, and the plaintiff requested a memorandum "of the amounts that she put into the business;" that Megerle took the books and checked over the amounts that had been paid into the company, and there was a discussion as to whether it amounted to $29,000 or $30,000, after which the witness wrote out the notes sued upon and Mrs. Brinkmann was to bring in some other notes which she had, and the new notes were to be signed by William Brinkmann, as secretary, and were also to be indorsed by him, and that he, the witness, took the notes and put them in his desk. He testified that the notes which the plaintiff was to bring in were never brought in, and that the notes sued upon were not given to Mrs. Brinkmann and that she did not take them away with her at the time they were made out.

He further testified that at this time notes were made out representing the amount Gehl had invested in the company, and these notes were signed by the witness, as president, and the plaintiff's son, as secretary. He testified that he did not have a meeting in his office in the Tribune Building, attended by the plaintiff and her daughter and son in January 1921, but that there was such a meeting in April of that year. He testified that the $30,000 represented by the plaintiff's notes, was represented by an item of $5,000 for her subscription to capital stock, $5,000 she advanced for the subscription of her son, and $4,000 for the subscription of Megerle, - that these amounts were included in the notes she held.

The witness Megerle was called to the stand by the plaintiff and he testified that he was the manager and treasurer of the Megerle-Brinkman Co.; that he at no time made any entries as to the capital stock of the company, up to the time he left the employ of the company, in November, 1920. On cross-examination he was asked "That was an oversight on your part, wasn't it?" and he answered that it was not an oversight, that no one had ever told him to make entries in the books with reference to the capital stock. This witness was later recalled by the plaintiff and shown a statement which he said he prepared at the direction of Bartel. This statement was entitled, "Financial Statement of the Megerle-Brinkman Co., October 1, 1920." It contains a list of assets and liabilities. The list of liabilities contains nine items, referred to as "Bills payable" the first of which is "Selma Brinkman, $33,350."

On cross-examination he testified that all the money that was paid into the company by anybody was carried simply as "bills payable" and that if any of it was to apply on stock, "and was put on the books, it would reduce that amount of money, it would reduce the account of the bills payable."

The plaintiff's son was recalled to the stand in behalf of the plaintiff and a document entitled "Statement" and reading, "Chicago, October 1, 1920, Selma Brinkman in account with Megerle&Brinkman Co." was introduced in evidence. The witness testified he received that document from Megerle and Bartel on the day which the document bore, October 1, 1920, at which time he was directed to give it to his mother; that the defendant Gehl was present at that time and that he received the document, and not his mother, because he was sitting nearer to Bartel than his mother was. This statement contained several items of interest, one an item of interest on $27,000, to October 1, at 7 per cent, from June 25; another, interest on $2,000 to October 1, from May 5; and another, interest on $2,000 to October 1, from March 3, totalling $637.39, from which there was deducted interest on $1,000, from September 10 to October 1, amounting to $3,88, leaving a balance of $633.51. It will be seen that this interest covered an aggregate principal of $30,000.

In support of the judgment appealed from the defendant contends that he was merely an investor in the company and not in touch with its business, and that the failure of the company occasioned a loss to him as well as to the plaintiff. All of this might be true and yet the de-

fendant be liable as an indorser on these notes. He admits that he was the vice president of the company. He does not contend that there was not sufficient consideration to support his indorsement.

He contends that the notes were incomplete upon their face and that they were never delivered. It is entirely clear from the testimony to which we have referred, that William Brinkman, as secretary of the company, was a mere "dummy". There is no such evidence in the record as would tend to show that these notes required his signature. That he signed certain other notes issued by the company does not establish the fact that the notes in question, signed by Bartel as president, were not the company's notes. The only one who testified that the notes were not delivered was Bartel. Even the defendant does not testify to that. Such inferences as may be drawn from his testimony on the subject, would indicate that they were delivered, as testified to by the plaintiff, her daughter and her son. Bartel also denied that the parties met in his office in January 1931, as testified to by those witnesses, which fact was expressly admitted by the defendant in the course of his testimony. The evidence shows beyond all reasonable doubt, that the notes were delivered.

The only further contention advanced by the defendant, in support of the judgment, is that the plaintiff is not entitled to recover on these notes because he did not receive a proper notice of dishonor and demand for payment. If that was the basis of the action of the jury in finding the issues for the defendant, we are of the opinion that the

finding was against the manifest weight of the evidence, which shows that in January, 1921, the plaintiff made what amounted in substance, to a demand for the payment of her notes and the return of her money by the company, in the defendant's presence, and that it was made clear to her that the company could not pay her and she received the defendant's assurance that he would pay the notes. In that situation, nothing further was needed in the way of formal notice of dishonor and demand upon the defendant. Kewanee National Bank v. Ladd, 175 Ill. App. 151.

That this $30,000 which had been paid into the company by the plaintiff did not represent in part any stock subscriptions made by her, is entirely clear. If the contrary were the case, the company would not have given her the statement it did, showing what was due her as interest at 7 per cent on the $30,000, up to the date of the notes sued upon, nor would the financial statement of the company list its indebtedness to her under "Bills Payable," as the record shows it did. Taking it as a whole we would say that the evidence introduced in behalf of the defendant tended to strengthen rather than weaken the plaintiff's case.

The plaintiff complains of the fact that certain incompetent evidence was introduced by the defendant. The plaintiff is in no position to complain of that, as the record shows no objection was made to it. However, as the case is to be tried again we will say that there is grave doubt as to the admissibility of much of the testimony which the defendant offered. Weinstein v. Sprintz, 234 Ill. App. 493.

For the reasons stated the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

470 - 29887

MARGARET DANIELS, Assignee of Mamie Loftus,

Appellee,

v.

PRUDENTIAL INSURANCE COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 667

Opinion filed Dec. 2, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Insurance Company seeks to reverse a judgment for $133.40, recovered against it in the Municipal Court of Chicago by the plaintiff, who brought this action, claiming $358, under an insurance policy issued by the defendant Company to Mamie Loftus, which policy the plaintiff alleged had been assigned to her a few days before Mamie Loftus died. In her statement of claim the plaintiff alleged that the consideration for said assignment was moneys due and owing from the deceased to the plaintiff for board and for medicines and room rent, amounting to $413, and the payment of undertaker's expenses upon the death of Mamie Loftus. She further alleged that when Mamie Loftus died she employed an undertaker and in that connection incurred an expense of $142, and that this bill had later been paid by the Insurance Company, under the terms of the policy it had issued to Mamie Loftus; and the plaintiff's suit was for the balance between the amount of the policy, $500, and the payment which she alleged had been made to the undertaker, by the insurance company, of

Opinion filed Dec. 3, 1938.

$142, or $358.

By its affidavit of merits the defendant denied the material allegations set forth by the plaintiff in her statement of claim, and alleged that under the terms of the policy, the liability of the Insurance Company, upon the death of Mamie Loftus, amounted to only $386.60; and that under the terms of the policy the Company had paid the undertaker's bill, amounting to $188.50 and had paid the balance to one Hattie Maher, a sister of the insured, Mamie Loftus, and that it owed nothing further, under the policy, either to the plaintiff or anybody else. Defendant further denied that there had been any assignment of the policy.

The issues thus joined were submitted to a jury resulting in a verdict finding the issues for the plaintiff and fixing her damages at the sum of $133.40, following which the judgment was entered.

The policy issued by the defendant Company to Mamie Loftus called for a payment of $500 immediately upon receipt of proof of the death of the insured, "to the executors or administrators of the insured, unless payment be made under the terms of the next succeeding paragraph." The paragraph referred to provided that it was "understood and agreed that the Company may make any payment * * * provided for in this policy, to any relative by blood or connection by marriage of the insured, or to any person appearing to said Company to be equitably entitled to the same, by reason of having incurred expenses on behalf of the insured, for his or her burial, or , if the insured be more than fifteen years of age at the date of this policy, for

any other purpose, and the production by the Company of a receipt signed by any or either of said persons or by other sufficient proof of such payment * * * to any or either of them, shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied." Another clause in the policy contained a provision to the effect that if the age of the insured had been misrepresented "the amount payable under this policy shall be such as the premium would have purchased at the correct age." The age of the insured as given in the policy was 36. The only testimony in the record concerning her age is to be found in a deposition given by her sister to the effect that she was born in 1876. The policy was issued in 1920. That being the case, the insured was 44 years old at the time the policy was issued, and not 36. The uncontradicted evidence is that the premium called for by this policy would purchase $366.60 in insurance, at the age of 44. That being the case, that amount would measure the liability of the defendant in any event.

The deceased Mamie Loftus apparently had no immediate family. She lived in a small apartment, renting out two rooms. Some weeks before her death, when she was very ill, one of the roomers summoned her friend, the plaintiff, to care for her. The plaintiff testified that she was at the home of Mamie Loftus for five or six weeks before her death, caring for her night and day, and that about two weeks prior to her death Mamie Loftus gave the plaintiff her insurance policy. The defendant had been notified to produce the policy at the trial and the policy which they produced was shown to the plaintiff and she was asked if that was the

policy which the deceased had given her, and she said that it could not be because there was an assignment on the back of the policy she received from Mamie Loftus, which assignment was duly executed. The plaintiff testified that after the death of Mamie Loftus, one English, an agent of the defendant, called at the house and she turned the policy over to him, and when she did so "he seen the writing on the back of it and he said to me I was not the beneficiary because the sister was, and he refused to bury her and I sent a telegram to her sister, what I should do." The telegram which the plaintiff received in reply from the sister, Hattie Maher, directing the plaintiff to bury the deceased in Chicago, was received in evidence. The plaintiff testified that she was told to go to the defendant's office and that she did so on several occasions "until I got tired." She further testified that when she went over to take care of Mamie Loftus the latter was behind several weeks on her payments for the premiums on this policy and that she, the plaintiff, paid them. The weekly premium was 30 cents. The plaintiff also testified that she paid out "about ten or fifteen dollars, something like that" for medicines and that she paid "the rent for the flat and bills for food and everything." She was asked how much they amounted to and she answered, "The rent was $12.00 and I supplied clothes for her." She testified further that about seven years prior to her death Mamie Loftus had boarded with her for a period of about three years, her board amounting to $7.00 a week, but that she had only paid her for about a year and that since then she had been owing for the balance of that time. On cross-examination the plaintiff first testified that she did

not know Mamie Loftus had a sister. She was then asked if it was not a fact that the first thing she did after Mamie Loftus died was to send a telegram to her sister, Hattie Maher, at Marquette, Michigan. She then admitted that she did know that the deceased had a sister. She admitted further, on cross-examination, that she had told the defendant's agent that she, herself, was a sister of the deceased, but she explained this by saying that the undertaker had told her she had to say that "to get her buried, otherwise the insurance would not bury her."

A man who had roomed in the home of the deceased for some four or five years before she died, testified that he was the one who called the plaintiff to take care of the deceased some weeks before her death. He testified further that shortly before the death of Mamie Loftus he was standing by her bed, "when she signed on the back part of the policy that she gave it to Mrs. Daniels and I was a witness to that. That was a Prudential Insurance policy." He was shown the policy produced by the defendant and was asked if that was the policy and he stated it was not. On cross-examination he was asked whom he had talked with about the case and he said he had talked with the plaintiff and he was then asked if she told him what was on the back of the policy and he said he saw it there himself. Upon being asked what it was he replied, "that she gave the policy and what was in the house, everything, to Mrs. Daniels, because 'I owe her more money than that,' she said." He was also asked whether he knew the signature of the deceased and he said, "Yes, I believe I do." He was then handed one or two documents purporting to contain her signature and he was asked if her sig-

nature was there and he said, "No, I don't think it is, I am not sure of it," and he later added, "I can't tell her signature. I don't know if I ever saw it."

The defendant's agent, English, testified that the policy produced by the defendant at the trial was the policy turned over to him by the plaintiff at the home of the deceased a day or two following her death, and that as so produced at the trial, it was in the same condition as it was at the time he received it from the plaintiff, and that he had never seen an endorsement on the policy. This witness further testified that when he called at the home of the deceased on the first occasion after her death, the plaintiff told him she was a sister of the deceased; that he then left a doctor's certificate with her and told her to have it filled out and he would be back the following day with some other papers which he did not then have with him; that he came back again the next day and saw the plaintiff and said to her, "You are not a sister of Mrs. Loftus, you told me yesterday you were her sister," whereupon the plaintiff replied, "She called me a sister." He then explained to her that she was not the beneficiary under the policy and then asked her where the "Will Form" in this policy was and she replied that there was none, whereupon he told her that the Company had a record of the Will Form on the policy of the deceased, which the latter had made out to her sister. He also testified, without objection, that the undertaker told him a day or two after the death of the deceased that the plaintiff had torn the original Will Form off the policy and brought it over to him. The agent further testified that he told the plaintiff if she had any claim to make against the

Company for any portion of the money due under the policy, she should "fix up an itemized statement of what Mrs. Loftus owed her and I would send the claim in to the Company and she said she had a lawyer to take care of her case and I told her to let her lawyer take care of it." He further testified that no such statement or claim was ever received from the plaintiff. From his testimony it appears that in some instances the defendant issued a duplicate of its policies, but that the policy produced by the defendant in this case was the original policy and the one which he had received personally from the plaintiff. He explained that a "Will Form" was a form the defendant used "on industrial insurance in case a party wants to make anybody a beneficiary in the policy they sign the Will Form and that makes them the beneficiary in the policy." The defendant then produced and introduced in evidence a form, dated a month after the date of the policy and about two years prior to the date of the death of the insured, in which she requested and authorized the Company, in theevent of her death, to pay the amount of the benefit specified in the policy to her sister, Hattie Maher, provided the latter survived her, and this document provided that "the receipt signed by said person or other sufficient proof of such payment, shall operate in the same manner as the receipt or proof of payment described in said policy." This document further provided that it was mutually agreed that nothing contained therein was to vary in any manner any of the provisions, agreements or conditions contained in the policy or the application therefor, "especially the provision in the policy that the Company may make payment provided for in the policy to any relative by blood or connection by marriage of the insured, or to any other

person appearing to said Company to be equitably entitled to the same, anything herein to the contrary notwithstanding."

While it does not affect the decision of this case, we feel compelled to observe that such provisions as we have quoted from this policy, and this so-called "Will Form" are so worded by the Company as to mean that a designation by the insured may be ignored by the Company at will. Under such clauses as these, if an insured designated a sister, for example, as her beneficiary, the Company might elect not to pay the sister at all but some stranger, provided only, it "appeared" to the Company that such stranger was "equitably entitled" to the money, by reason of having been put to some expense in behalf of the insured. Such provisions are certainly not to be encouraged.

A superintendent of the defendant Company testified that in his experience of 22 years he had never seen a duplicate policy issued by the Company unless the word "Duplicate" was marked upon it. The policy introduced in this case contained no such designation.

The deposition of Hattie Maher, the sister of the insured, was taken and she stated that the insured had at one time sent the policy to her and had later written and asked her to return it, which she had done, and that she was, therefore, greatly surprised when she learned, after her sister's death, that she had designated her as her beneficiary. She testified further that after she had received the money which the defendant Company had sent to her, under the policy, she kept on receiving bills for her sister, and she paid them as they came in, so that when she was through she had less than

$70.00 left.

It is apparent that in finding the issues for the plaintiff the jury did not adopt the theory advanced by her on the trial of the case. She was suing for $356, which she claimed was the difference between the face of the policy, $500, and the amount she alleged the Company had paid to the undertaker, $143.00. Although the jury found the issues in favor of the plaintiff, they, however, did not fix her damages at $356, the amount she claimed, but they fixed her damages at the sum of $133.40. The evidence shows that the undertaker's bill amounted to $168.50, and that the Company, considering themselves liable for a maximum $368.60, paid the difference between that amount and the undertaker's bill, which difference was $138.10, to the sister of the deceased, as designated by her in the so-called "Will Form". The jury apparently considered that the defendant ought to be required to pay the face of the policy, $500, and in awarding the plaintiff damages in the sum of $133.40, they fixed the amount at exactly the difference between $500 and the sum of the undertaker's bill, $168.50, and the payment to the sister of the deceased, $138.10. In doing this, it will be seen that the jury gave the defendant credit for the payment of $138.10 to Hattie Maher, and as to the issues involved between the parties, on that payment, the jury's finding was really for the defendant.

So far as the finding of the jury may be considered as involving the question of the assignment of the policy, by the deceased to the plaintiff, we are of the opinion that the

finding was against the manifest weight of the evidence. It would seem to be entirely clear from the evidence that there was no assignment of this policy, and that the policy introduced in evidence was the policy issued to the deceased and turned over to the agent of the Company by the plaintiff. Nothing whatever appears on the reverse side of this policy and it is entirely clear from an examination of theoriginal policy as we find it in the record, that nothing was ever written upon the back of it. The testimony submitted by the plaintiff was that the assignment she claimed the deceased had written upon the policy was written with pen and ink.

However, we are further of the opinion that even if the deceased had executed an assignment of the policy, as claimed by the plaintiff, the Company could, under the terms of the policy and the so-called 'Will Form' pay the undertaker's bill and the balance to the sister of the deceased. That they did so is shown by the uncontradicted evidence in the record, and that these payments made up the total amount of defendant's liability under the terms of the policy, was also established by the uncontradicted evidence in the record to which we have already referred. We are, therefore, of the opinion that the trial court should have instructed the jury to find the issues for the defendant, as requested in the motion submitted at the close of the case.

For the reasons stated the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

488 - 29905

WILLIAM F. BODE,

Appellee,

v.

JOHN CLAY, JR.,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

239 I.A. 667

Opinion filed Dec. 2. 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Clay seeks to reverse a judgment for $350, recovered against him by the plaintiff in the County Court of Cook County, for damages caused to the plaintiff's automobile, in a collision with one driven by the defendant.

The collision occurred late in the evening on January 16, 1923, at the intersection of 47th street and Woodlawn avenue in the City of Chicago; 47th street being an east and west street on which a double track street car line was located, and Woodlawn avenue being a north and south street without street car tracks. The two streets intersect at right angles. The plaintiff's car was a heavy seven passenger Cadillac. It was being driven east on 47th street in the eastbound street car track. The defendant's car was a light Packard coupe. It was being driven north in Woodlawn avenue on the east side of the street. The Packard hit the Cadillac, toward the rear of the latter car, swinging it around toward the northeast and throwing it up against the front of an electric auto-

Opinion filed Dec. 8, 1939.

mobile that had come up and stopped just east of the east crosswalk of the intersection. This electric automobile had been driven west in 47th street, with the left wheels between the rails of the west bound street car track and the right wheels north of that track. A westbound street car was brought to a stop a few feet east of the electric automobile, just as this collision took place.

The driver of the electric automobile testified that he saw the defendant approaching 47th street from the south and he knew he could not get across the street, 'before he got to me because I figured he would'nt get it stopped at the speed he was going, so I brought my car to a stop.' He testified that the defendant was driving his car around 30 miles an hour and he didn't notice whether it slowed up any as it reached the crossing. He said he first saw the defendant's car when it was seventy-five or one hundred feet away. The evidence shows that both streets at this intersection are about 75 feet in width.

The motorman of the street car testified that he saw the plaintiff's car coming east on 47th street and the defendant's car coming north on Woodlawn avenue, and that the two cars came together on the east side of Woodlawn avenue, the front end of the defendant's car striking the rear end of the plaintiff's car. This witness saw the plaintiff's car before he saw the car of the defendant. He did not notice the latter until it was 'just about the

the south building line" of 47th street. He gave it as his opinion that the cars were traveling at about the same speed and that they both entered the intersection at about the same time. That this could not be accurate is apparent from the fact that the plaintiff's car moved almost entirely across Woodlawn avenue from the point where it entered the intersection to the point of collision, while the defendant's car moved only about one quarter of distance across 47th street between the point where it entered the intersection and the point of collision.

The plaintiff's chauffeur testified that he was driving east in the eastbound car track on 47th street about 15 miles per hour, and as he reached Woodlawn avenue he looked to see if there were other cars going north and south; that as he looked he could "take in from fifty to seventy-five feet" when he was even with the building line, and that he saw no car and he proceeded east; and he next saw the defendant's car only a few feet from him, for "he was going so fast it was hard to see and he hit me," when his car "was on the other side of the intersection." He testified that at the speed he was going he could have stopped his car in five feet.

The defendant testified that he was driving his car at about 15 miles an hour and continued at that speed until he reached the crossing; that he blew his horn about 50 feet from 47th street; that he started to look to the left, to see if there was anything coming from that way, when he saw the electric automobile, which had "gradually

slowed down" on the east side of the intersection "and I kept my eye on that to make sure I wasn't going to hit him and just then I heard a crash. * * * I didn't see the other car at all, the car that hit me. I saw the street car * * * I did not hear any signal from the Cadillac." On cross-examination he testified that he slowed down when he got to 47th street to about 10 miles an hour; that he knew there was a street car standing there.

One Mulry was walking south on the east side of Woodlawn avenue about 150 feet north of 47th street. The first car he noticed was that of the defendant, coming north in Woodlawn avenue. He then noticed the plaintiff's car coming east in 47th street. When he saw the defendant's car it was 200 or 300 feet from the intersection and when he saw the plaintiff's car, "almost at the same time," it was 100 or 150 feet west of the intersection. He testified that the plaintiff's car reached the intersection a little before the defendant's car did. On cross-examination this witness testified that the defendant's car was a "small Six" coupe and the defendant's car was a much larger and a much heavier car.

The defendant contends that the verdict and judgment are against the manifest weight of the evidence on the issue of the plaintiff's contributory negligence. The defendant presents his argument in support of that contention on the theory that these two cars reached the intersection at about the same time and that as his car was approaching from the right, it was incumbent upon the plaintiff to give him the right of way, citing Partridge v. Eberstein,

225 Ill. App. 309. In that case this court remarked that both the plaintiff and the defendant were approaching the intersection there involved "at such a rate of speed and at such respective distances from the intersection as to come under the operation of the statute, and the plaintiff should have given the right of way to the defendant's automobile," and the fact that he did not "contributed to the accident and hence he is barred from recovering damages in this action." In our opinion the testimony presented in the case at bar presents a somewhat different situation. In our opinion the rule as to the respective rights of parties approaching a street intersection from different directions, is correctly set forth in Salmon v. Wilson, 227 Ill. App. 386 and Darling & Co. v. Yellow Cab Company, Ill. App. Ct. First District, Case No. 29875,(not yet reported) opinion filed October 28, 1925.

The witness who was driving the electric automobile was in a position to give more reliable testimony about the approach of the defendant's car to this intersection than the motorman of the street car was. The driver of the electric automobile was nearer the intersection and he brought his car to a stop because he was watching the approach of the defendant's car. The motorman of the following street car, whose testimony is emphasized by counsel for the defendant, in presenting his argument in this case, was further from the intersection and he was watching the electric automobile ahead of him, to see where it was going to stop, so that he might be sure to avoid hitting

him. The motorman testified that he did not notice the defendant's car at all until it reached the south side of 47th street. The driver of the electric automobile who was watching the approach of the defendant's car across his path, and who stopped because of that approach, testified that the defendant was driving 30 miles an hour. The testimony of the plaintiff's chauffeur to the effect that he was driving the plaintiff's car 15 miles an hour is not contradicted. He drove over three quarters of the way across Woodlawn avenue before his car was struck, near the rear, when it was practically across the intersection by the defendant's automobile which was driven along the east side of Woodlawn avenue. If the plaintiff's car was being driven at a speed of 15 miles an hour and the defendant's was driven twice as fast, it is quite apparent that the plaintiff reached the intersection first for it traveled over twice as far as the defendant's car did, in the intersection, before the collision. When the plaintiff's car reached the intersection the defendant's car must have been some distance south of it. It certainly could not be said as a matter of law, from the evidence in this record, with reference to the positions of the respective cars, in relation to the intersection, that the defendant was in a position to claim the right of way, nor, if he finding of the jury was based on the belief that the defendant was not in such a position, as a matter of fact, could it be said that such finding is against the manifest weight of the evidence.

The plaintiff's chauffeur testified that he looked to the south as he approached the intersection and could see

no car approaching. It was late at night andthe evidence does not disclose the condition of the lights on the defendant's automobile nor just what the condition was with regard to light about the intersection of these two streets. The question of the alleged contributory negligence of the plaintiff's chauffeur was for the jury to pass on, and we cannot say from the evidence in this record that their finding on this issue is against the manifest weight of the evidence.

The defendant complains of the refusal of the court to give two of the instructions requested by him. One of these referred to the question of contributory negligence. In our opinion the refusal of this instruction was justified for two reasons. The first is that the instruction is argumentative. Its opening sentence read as follows: "The court instructs the jury that the law does not permit one carelessly and negligently to bring upon one's self or one's property an injury and then recover damages because of the concurrent negligence of some other person." The second reason is that the defendant's given instructions numbered 16 and 22, amply covered the question of contributory negligence from the defendant's point of view. The other requested instruction which the court refused, was one by which it was sought to tell the jury that there could be no recovery by the plaintiff under the sixth count of the declaration. That count charged the defendant with violation of a statute requiring motor vehicles to be equipped with good and sufficient brakes. There is no evidence whatever in the record, on the question of the condition of the brakes on the defendant's car. The instruction should have been given, but the failure

of the court to give it, should, in our opinion, not affect this judgment as the judgment is amply supported by the remaining counts of the declaration and theevidence relating to the allegations made in those counts.

For the reasons stated the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ., CONCUR.

336 - 30179

LEY-CROSS PRINTING CO., a corp.,
Appellee,

v.

T. H. FLOOD & CO., a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 667

Opinion filed Dec. 2, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $483.00 recovered by the plaintiff in the Municipal Court of Chicago. The action was brought to recover the amount claimed by the plaintiff to be due from the defendant "for work, labor and material furnished the defendant * * * on April 16, 1924, " and it was alleged in the statement of claim that the defendant had failed and refused to pay the amount although often requested to do so. In reply, the defendant filed its affidavit of merits in which it was alleged that the parties had agreed that payment should be made, on the account sued for, ninety days after the work had been completed and the material delivered; that delivery was made on April 21, 1924, "and that no part of the amount required to be paid by the defendant under said contract was due at the time of the commencement of the suit," which was June 3, 1924.

With the pleadings in that form the case was reached for trial, and, the defendant not being present in court nor represented, the case was heard, the plaintiff presenting its

Opinion filed Dec. 3, 1925.

proof, and judgment was entered for the plaintiff, in the sum of $483.

The only contention made in support of this appeal is that, as the defendant, by its affidavit of merits, set up allegations of fact which constituted a bar to the action, and the plaintiff filed no replication or reply, there was no issue before the court to be tried, because, as the pleadings stood, the facts alleged by the defendant in its affidavit of merits must be taken as true and a bar to the action, unless the defendant in some manner waived its defense, which it did not do.

There are two reasons why that contention is untenable. The first is the pleadings did join issue as they stood. By its statement of claim the plaintiff alleged that the defendant "is indebted to it," and that the amount sued for "is due from defendant to plaintiff." By its affidavit of merits, the defendant alleged that "said amount or any part thereof was not due and owing by the defendant to the plaintiff at the time of the commencement of said suit." That joined the issue between the parties without anything further in the way of pleading. The second reason is, this was an action of the fourth class in the Municipal Court. In such a case the issues are what the proof shows them to be. Edgerton v. C. R. I & P. Ry. Co., 240 Ill. 311.

That this appeal was perfected solely for the purpose of delay, is obvious. The judgment of the Municipal Court is affirmed, with the addition of a penalty of ten per cent as provided by the statute. Cahill's Ill. Statutes, ch.33, sec. 23; Town v. Alexander, 85 Ill. App. 513; affirmed 185 Ill. 254; O'Neill v. Chicago Chronicle

Co., 98 Ill. App. 149.

JUDGMENT AFFIRMED WITH PENALTY.

143 - 29232

IN THE MATTER OF THE ESTATE OF JOHN F. SCHWANBECK, Deceased,

EMMA SCHWANBECK,

Appellant,

v.

JOSEPH A. WEBER and CHARLES A. WYMAN,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

239 I.A. 668

Opinion filed December 3, 1935.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal Emma Schwanbeck seeks to reverse a judgment entered by the Circuit Court of Cook County on the 14th day of November, 1933, whereby Joseph A. Weber was allowed $350.00 and Charles A. Wyman $100.00 for legal services rendered Emma Schwanbeck in the matter of the Estate of John F. Schwanbeck, deceased, and awarding Weber and Wyman a lien against the funds in the hands of the administratrix of the estate of the deceased belonging to Emma Schwanbeck.

The record discloses that John Schwanbeck was a widower, who had a family of five children, some of whom were adults; that sometime after the death of his wife he married Emma Schwanbeck, but that they did not get along well together and she filed a suit for a divorce against him; that while the suit was pending John Schwanbeck died leaving a small estate; that Mrs. Trapp, one of his daughters was appointed by the Probate Court of Cook County, administratrix of his estate. Shortly thereafter Emma Schwanbeck retained Joseph

Opinion filed December 3, 1885.

A. Weber to look after her interests and he filed a petition in the Probate Court of Cook County, seeking to have the letters of administration, which had theretofore been issued to Mrs. Trapp, revoked and to have Mrs. Schwanbeck appointed administratrix of the estate. The matter came on for hearing in the Probate Court before Judge Horner, and after a hearing, the court indicated that he would revoke the letters and grant the prayer of the petition, but it was suggested by the court that Attorney Weber be appointed administrator in lieu of Mrs. Schwanbeck, to which Weber agreed. Mrs. Trapp prosecuted an appeal from the order of the Probate Court to the Circuit Court and while the matter was there pending a motion was made by Mrs. Trapp to vacate and set aside the order of revocation. This motion was denied and an appeal was prosecuted to the Circuit Court of Cook County. The first appeal came on for hearing before Judge Barrett and he concurred in the decision of Judge Horner, revoking the letters which had been issued to Mrs. Trapp and the latter prosecuted an appeal to this court. Afterwards the appeal from the second order came on for hearing before Judge McGoorty in the Circuit Court. What became of the matter that came before Judge McGoorty does not appear, except that the matters were before him on a number of occasions. Mrs. Schwanbeck became dissatisfied with what had been done by the Probate Judge and the two Circuit Court judges and criticized them and her counsel Weber, and Weber refused to have anything further to do in the matter. Later Attorney Wyman appeared in the Probate Court on behalf of Mrs. Schwanbeck, although she testifies she never employed him, and proceedings were had whereby the Probate Court entered an order on the 30th day of December, 1918, in which all the interests of Mrs.

Schwanbeck in the Estate were submitted to Judge Horner by agreement and after hearing the matter, the court entered an order wherein it was stated that "the said Emma Schwanbeck, the petitioner being present in open court on all of the aforesaid hearings, together with her counsel, the matters in dispute were submitted to the court and the court found that prior to the death of John Schwanbeck, his wife filed a bill for divorce against him, and that about a month before his death she received $340.00 from him and signed a paper purporting to release him from alimony, solicitor's fees and releasing any dower or homestead rights that she had. The court there further found that John Schwanbeck owned some real estate, but that it was not in his name of record, and that was worth from $1500.00 to $1800.00 and personal property in possession of Mrs. Trapp, as administratrix; that there were certain minor children entitled to a child's award, and it was ordered that the administratrix pay to Emma Schanbeck $750.00 in cash, and deliver certain items of personal property to her in full satisfaction of all her claims against the estate and the property of the deceased. An appeal was prayed from this order but apparently never perfected, and the record tends to show that afterwards this $750.00 was deposited by order of the Probate Court with the County Treasurer for the benefit of Emma Schwanbeck, she having refused to accept it.

The matter of the allowance of attorneys fees to Weber and Wyman came on for hearing before the Probate Court, and after a full hearing, the court indicated that he would allow Weber $350.00 and Wyman $100.00, but if they were paid at once without an appeal from his order, he would fix Weber's

fee at $150.00 and Wyman's fee at $75.00. An order was entered fixing their fees at the last mentioned amounts. Afterwards Mrs. Schwanbeck prayed an appeal, and thereupon Judge Horner of the Probate Court entered an order fixing Weber's fees at $250.00 and Wyman's fees at $100.00. An appeal was taken by Mrs. Schwanbeck to the Circuit Court of Cook County, where the matter came on for hearing before the Hon. Edward D. Shurtleff, and after a hearing before Judge Shurtleff, judgment was entered for the same amounts as those fixed by Judge Horner, and it is an appeal from this judgment that is before us.

There is evidence in the record as to the services rendered by Weber and Wyman and as to the reasonable charge for such services and from such evidence it is clear that Weber has earned at least twice as much as the court allowed. It is also clear that the amount allowed Wyman, is to say the least, very reasonable. Neither of these men have been paid anything for their services and Mrs. Schwanbeck complains of in this court that after seven to nine years after the death of her husband she received nothing from the estate. It is apparent that the reason she has received nothing has been due entirely to her own fault. The estate was small in the beginning. The part that was coming to Mrs. Schwanbeck is but a small amount. It has been frittered away by useless litigation, most of which it is clear was carried on by the insistence of Mrs. Schwanbeck. The judgment appealed from was entered on the 14th of November, 1923. A short record was filed in this court March 5, 1924. The time to file the complete record was extended and a complete record filed May 3,

1934. From that time numerous extensions of time have been allowed Mrs. Schwanbeck by this court within which to file her abstract and brief. The counsel she had on the trial before Judge Shurtleff were permitted to withdraw in this court on June 25, 1935. Her abstract was not filed until January 26, 1935. And after repeated indulgenses of this court, her brief was not filed until June 8, 1935. On account of thesummer vacation, Weber's brief was not filed until October 23, 1935, and Mrs. Schwanbeck's reply filed November 5, 1935. Numerous points arevmade in the brief, but we will only refer to a few of them in this opinion. We have examined all of them and they are without merit.

When the case came on for hearing before Judge Shurtleff, which was about a year after the appeal had been taken from the Probate Court, counsel for Mrs. Schwanbeck moved for a continuance, supported by an affidavit, that it was neccessary to have Mrs. Trapp called as a witness. But it is clear from a reading of the affidavit that there was no assurance that Mrs. Trapp would be in the court in case a continuance were granted and it is perfectly clear that Mrs. Trapp could have been of little or no assistance in giving any testimony, except as to what Weber and Wyman did for Mrs. Schwanbeck. The court overruled the motion and we think rightly. Thereupon Mrs. Schwanbeck moved for a bill of particulars, which the court also overruled. This action was entirely unwarranted as it came too late when the case was ready for trial. Moreover, Mrs. Schwanbeck personally knew of most of the service that had been rendered by Weber and Wyman, because the evidence shows she was with the attorneys on numerous occasions in court. When this motion was denied

her counsel moved the court for a trial by jury. The record does not disclose any ruling of the court on this motion, but there was a interpolation written in the record, showing that the court had overruled the motion and exception taken. We have therefore, on motion of counsel, stricken this interpolation from the record, so that it appears from the record that the court did not pass upon the motion. Moreover, we think that theparties were not entitled to a jury trial. Doubet v. Doubet, 196 Ill. App. 289 and cases there cited.

After the trial of the case before Judge Shurtleff the same dilatory tactics were continued by Mrs. Schwanbeck and her then counsel. On November 14th, the day before the judgment was entered, counsel for Mrs. Schwanbeck asked for leave to file some affidavits. The court said it was too late - that he had decided the case. The affidavits are in the record and on the back of them is an endorsement by Judge Shurtleff in his own hand writing to the effect that he refused leave to file the affidavits because they were not true.

Complaint is also made that the court erred in admitting certain evidence, but there is no merit in these contentions. The issue was simple, viz. what was the reasonable value of the services rendered by the two attorneys. Judge Horner heard the matter and in addition to the evidence there introduced, he as Judge of the Probate Court knew personally of a great deal of the services rendered, because they were rendered in open court before him and he fixed the amounts which were afterwards approved by Judge Shurtleff.

There is no merit in the contentions made and the judgment of the Circuit Court is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

11 - 29547

THE WESLEY COMPANY,
a corporation,

Plaintiff in Error,

v.

GLOBE AND RUTGERS FIRE INSURANCE CO.,
OF NEW YORK,

Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 668

Opinion filed Dec. 2, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action in the Municipal Court of Chicago against the defendant to recover damages claimed to have been sustained on account of property being damaged by a fire which occurred at Holland, Michigan and which property was covered by a policy of insurance issued by the defendant. Plaintiff also brought another action against the Milwaukee Mechanics Insurance Company to recover damages caused by the same fire and based on a policy of insurance issued by that Company. The two cases were tried together by the court without a jury, the facts in both cases being the same. But one set of abstracts and briefs are filed in this court and this opinion will dispose of both cases. At the close of all the evidence the court found the issues against the plaintiff. Judgment was enteredupon the finding and writs of error were issued from this court, calling in question the correctness of the judgment rendered by the Municipal Court.

Opinion filed Dec. 8, 1936.

The record discloses that plaintiff was an Illinois corporation, engaged in business in Chicago, and that it maintained a store-house for some phonographs which it owned at Holland, Michigan. This store-house had been used by plaintiff for a number of years and when it obtained orders for phonographs, it shipped them from Holland to its customers. A considerable number of phonographs, which were in boxes and a number of empty boxes which were used in the shipment of phonographs were at plaintiff's store-house at Holland on January 8, 1923. Apparently no one was at Holland, representing the plaintiff but it appears that the store house had been closed for sometime. On January 8th Augustus J. Scribmier, plaintiff's secretary and treasurer, together with one Smith, went to Holland, Michigan for the purpose of conducting a sale of some of the phonographs, which sale was to be held on January 11th. They arrived at Holland on the morning of January 9th, 1923, prepared some advertising material to be inserted in the newspapers of that city and made other preparations for the sale of phonographs. Between 7:30 and 8:00 of the evening of January 10th, a fire was discovered in plaintiff's store-house. A few minuted thereafter the fire and police departments of that city arrived at the scene of the fire and the firemen succeeded in extinguishing the fire after considerable damage had been done. Afterwards adjusters were appointed, who agreed upon the amount of the loss, namely $6378.24 and an apportionment of the same between the two fire insurance companies was made and it was agreed that in case there was a liability, the Globe & Rutgers Fire Insurance Company should pay $4708.18 and the Milwaukee Mechanics Insurance

Company $1559.06, together with interest on such sums.

The defendants interposed three defenses. The first one was that the loss occurred while the hazard was greatly increased, in that immediately preceding the fire August J. Scritsmier and other agents of plaintiff placed an oil stove in the premises where the phonographs and boxes were stored; that the boxes were piled in such a way as to make access to the stove, where the fire originated, difficult or impossible; that such representatives of plaintiff sprinkled kerosene oil on the floor near the stove which caused the fire. In other words this defense was that plaintiff had violated the provisions of the policy by increasing the hazard. In effect and in fact it was a charge that plaintiff's representatives had set the place on fire.

The second defense interposed was that no recovery could be had because Augustus J. Scritsmier refused to submit to an examination under oath at Holland, Michigan, contrary to a provision of the policies. The third defense was that plaintiff, an Illinois corporation, was unlawfully engaged in business in Michigan, not having complied with the foreign corporation laws of that state, and therefore, the policies were void. We do not pass upon the third defense, because in the view we take of the case, it becomes immaterial.

As to the second defense we will only say that we think it is not sustained by the evidence. The policy provided that the insured as often as required should submit

to an examination under oath by any person named by the company and further that no action upon the policy should be maintained unless this provision was complied with. The record discloses that shortly after the fire criminal proceedings were instituted in Michigan against August J. Soritsmier on the theory that he had been guilty of arson in connection with the property in question. A few hours after the fire he returned to Chicago where he lived, and later on, the insurance company served notice under the policy, requiring him to appear at Holland, Michigan for examination. This he refused to do, under advice of counsel, on account of the criminal proceedings pending against him at Holland. The president of the defendant company appeared and gave testimony, under oath, in Chicago, under the provision of the policy and August J. Soritsmier was willing to appear at that time and place also, but the insurance company's representative was insistent that he give such evidence at Holland, Michigan. It will be noted that the provision of the policy does not specify where the examination mentioned in the provision referred to should be held. But counsel for the defendant states that under the authorities it is the law that the proper place is where the fire occurred and in support of this the cases of Pierce v. Globe & Rutgers, 182 Pac. 586; Connecticut Fire Insurance Co. v. George, 153 Pac. 116; are cited. We think neither of these cases are in point.

In the Pierce case the fire occurred at Pacific City, Washington, which was about twenty-five miles from Seattle and the person claiming damages under the policy

issued in that case was notified by the insurance company to appear at Seattle for examination. He went to Seattle, but was placed under arrest on the ground that he had been guilty of arson and at the time specified by the insurance company for the examination, he was in jail. Of course, he was unable to appear. The court held that he could not be required to appear at any place other than Pacific City where the fire occurred. In the George case the party appeared for examination as required by the policy, but refused to answer questions.

In the instant case so far as the record discloses, the defendant could have obtained all the information at much less expense and inconvenience at Chicago than at Holland, Michigan, all of the parties being here. It is clear that the examination was sought to be held at Holland for the sole purpose of permitting the authorities of that state to obtain jurisdiction of August J. Scritsmier, under the criminal proceedings there pending, he having refused to go there and it appears that extradiction of him had been denied. This defense is not sustained.

The substantial defense in the case was that of arson. The court at the request of plaintiff found a number of facts and also held a number of propositions of law and counsel for the defendant states that the findings of fact are not authorized by the law and in support of this cites First National Bank v. Northwestern Bank, 152 Ill. 296. The opinion in that case was rendered in 1894. The Practice Act at that time provided for the holding or refusing to hold

certain propositions of law; that provision was amended in 1907 so as to provide for the finding of material facts (Sec. 8, Practice Act). So that it appears that the most superficial examination ought to have disclosed that the case cited by counsel for defendant had no application.

The plaintiff requested the court to find as a fact "that the fire in question was not wilfully and intentionally caused by the plaintiff" which the court refused. The court held as a proposition of law which was submitted by counsel for plaintiff, that so far as the defense of arson was concerned, defendants were required to prove this beyond a reasonable doubt. So that it appears that the learned trial judge was of the opinion that the fire was started by plaintiff's representative beyond all reasonable doubt. We think the law did not require this degree of proof, but that the defendant was required only to show that the fire had been started by plaintiff's representatives by a preponderance of the evidence. Foster v. Graf, 287 Ill. 559. The persons claimed to have been guilty of arson in the instant case were either Augustus Schritsmier or Smith, or both. They are not parties to the suit, and therefore, the rule of law that where a cause of action or a defense charges the commission of a crime, such crime must be proven beyond reasonable doubt does not apply. But we are in entire accord with the finding of the trial judge. It is certain that sitting in a court of review, as we are, we would be unable to say that the finding of the trial court who heard and saw the witnesses testify and who was, therefore, in a much better

position to determine the truthfulness of their testimony, was against the manifest weight of the evidence. Nor are we able to say upon an examination of all the evidence in the record, that the proof did not show beyond all reasonable doubt that the fire had been started by plaintiff's representatives as the learned trial judge found.

Members of the fire and police departments of Holland testified on the trial and it appears from their testimony that when the firemen arrived at the scene of the fire and broke open the door, boxes, some of them containing phonographs and others empty, were piled across the entire building, a few feet inside of the door, and extended up nearly to the ceiling; that the fire was in the back end of the room, and the firemen were unable to gain access to it, there being no opening where it could be reached until a number of boxes in the center of the building had been removed. There is some evidence tending to show that there was a narrow irregular way leading from the front to the back where the stove was, but it is clear that it was so narrow that one man could not get through. The evidence also shows that there were two small stoves which burned kerosene oil in the building, one near the front and the other near the center in the rear; that boxes, some of them containing phonographs and others empty were piled in a circular manner around the stove in the rear; that there was excelsior and other material near that stove; that there was a strong smell of kerosene. After the fire was extinguished parts of the floor were cut up by the firemen; burned excelsior was removed and the police immediately

took charge of the premises. The evidence further tends to show that on January 9th, Augustus J. Scritsmier and Smith bought an electric stove from a merchant in Holland and that they returned it the next day and were given in exchange a kerosene oil burning stove. A police officer testified that in passing along his beat, a short time before the fire, he discovered two men piling up boxes in the premises. The evidence also showed that Scritsmier and Smith bought a five gallon can of kerosene, and that it was afterwards found upon the premises; about a gallon and a half of kerosene left in it. It further appears that criminal proceedings were brought in Michigan against Augustus J. Scritsmier, but whether against Smith does not appear. On behalf of plaintiff, Augustus J. Scritsmier testified and denied that he knew of the cause of the fire. He testified that he and Smith had been moving boxes in the premises so as to get the phonographs in condition for the sale, which was to take place upon the 11th. He admits buying a new stove, but denies that it was exchanged for an electric stove. He further testifies that the stove in the rear was an old one which plaintiff had just sent by express to Holland so as to help heat the premises; that this stove was placed in the rear of the store room and upon lighting it, it was found that it leaked; that they moved it around within a few feet from time to time and still found that it leaked; that they then took a part of it to a man nearby who said that he could repair the stove and that repairs were made on it; that afterwards the stove was again started and a short time before the fire he and Smith left the premises and went to their

hotel; that when he heard the fire alarm, he and Smith went to the premises but were told by a police officer that nothing could be done; that they then returned to the hotel and endeavored to telephone the president of the company, who was in Chicago, but were unable to make the connection, and left shortly after midnight, about one o'clock, for Chicago. There is other evidence in the record on this question, but we are clearly of the opinion that we would not be warranted in reversing the judgment in view of the trial court's finding. Augustus J. Soritemier was in no way corroborated by any one. The man who was said to have repaired the stove was not called. Nor was there any evidence that his deposition was sought. Nor was there any evidence by any expressman as to the delivery of the old stove from Chicago. Neither was any attempt made to corroborate the testimony that he endeavored to telephone Chicago shortly after the fire. He left at one o'clock that night. Criminal proceedings was started shortly thereafter against him and he has not gone back to Michigan. On the contrary he resisted extradiction proceedings. We have examined all of the evidence in the record and are clearly of the opinion that the judgment ought not to be disturbed.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

12 - 29548

THE WESLEY COMPANY,
a corp.,

Plaintiff in Error,

v.

MILWAUKEE MECHANICS INSURANCE CO.
OF MILWAUKEE, a Wisconsin corporation,

Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 668

Opinion filed December 2, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

We have this day filed an opinion in the Wesley Company v. Globe Rutgers Fire Insurance Company of New York, No. 29547, and for the reasons therein stated the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Opinion filed December 3, 1938.

30003

157 - 30003

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MICHAEL GLASSBERG,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

239 I.A. 668

Opinion filed Dec. 2, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Michael Glassberg and Morris Markin were found guilty of fraudulently conspiring to do an illegal act injurious to the public trade and their punishment fixed at imprisonment in the county jail for a term of thirty days and a fine of $2,000.00 each.

The indictment charged that the defendants unlawfully, wilfully and fraudulently conspired with each other and with another person to unlawfully do an illegal act injurious to public trade - that is they conspired to violate the Illinois Securities Law, otherwise known as the "Blue Sky Law" of this state, by offering to file and filing with the Secretary of State of the State of Illinois (1) a fraudulent balance sheet of and concerning the Checker Cab Manufacturing Corporation, a corporation which showed that the Checker Cab Manufacturing corporation owned notes receivable in the sum of $5426.84, when in fact it owned no such notes; (2) a certain schedule of machinery and equipment owned and possessed by the

Opinion filed Dec. 9, 1926.

Checker Cab Manufacturing Corporation, wherein it was stated that the Cab Company owned a body jig which was worth $6500.00, when in truth and fact its value did not exceed $500.00; that the Cab Company owned and possessed a sample body of the value of $35,000.00, and an engineering design of the sample body of the value of $15,000.00, while in truth and fact the sample body was of a value of not exceeding $1,000.00. It also charged that they also filed a false statement with the Secretary of State in relation to the assets of the Markin Auto Body Corporation, which had theretofore been taken over by the Checker Cab Manufacturing Corporation, showing that the assets of the Markin Company were appraised at $182,705.28, when in fact the fair value of the assets of that Company did not exceed $50,000.00; and that the defendants omitted a note for $38,000.00 of the Markin Company, which was assumed by the Checker Cab Corporation; that all of the statements and schedules showing the assets of the Checker Cab Manufacturing Corporation were filed with the Secretary of State in the matter of the sale of stock of the Checker Cab Manufactur ing Corporation, which under the Securities Act was classified as Class "D", and that the defendants unlawfully and wilfully offered for sale and sold shares of the stock of the Checker Cab Manufacturing Corporation in violation of the Securities Law.

The people introduced in evidence the papers and documents filed by the defendants in the office of the Secretary of State of the State of Illinois. They also offered evidence of certain witnesses who gave testimony, showing that certain of the documents filed with the Secretary of State

bore the signatures of the defendants, and that the assets of the Checker Cab Manufacturing Corporation as shown by the documents filed with the Secretary of State were not of the value as shown by those documents, but were of a much less value. The evidence of the people further tended to show that an appraisement of certain of the assets had in fact not been made, contrary to the statement made in the documents filed with the Secretary of State; that in certain instances the value of assets was arbitrarily increased over what they really were; that the Checker Cab Manufacturing Corporation had assumed to pay and was liable for the $28,000.00 note of the Markin Auto Body Corporation, but that this item was omitted from the papers filed with the Secretary of State. Other evidence was introduced by the people tending to prove the allegations of the indictment to the effect that the assets of the Checker Cab Manufacturing Corporation was of much less value than as stated in the documents filed with the Secretary of State. The defendants offered no evidence, so that the case went to the jury on the evidence offered on behalf of the people alone.

1. The defendants contend that the judgment is wrong and should be reversed because no offense is charged in the indictment, and therefore, the court erred in denying their motion in arrest of judgment. In support of this it is said that the indictment which consisted of but one count, the second and third having been nolled by the State, alleges that the defendants offered to file and filed with the Secretary of State of the State of Illinois, certain documents,

and that this was insufficient because it does not allege that they were to be filed "in the office of the Secretary of State of the State of Illinois." This argument in our opinion is without merit. Of course, the papers were to be filed with the Secretary of State in his office and the evidence shows that they were so filed. And certainly the indictment is sufficient when tested only by a motion in arrest of judgment.

It is next argued that "The indictment charges a conspiracy to do 'illegal acts injurious to the public trade, that is to say', and then proceeds to enumerate, under that videlicet, the several alleged illegal acts, but only one of which is a criminal offense, namely, the act described in paragraph (e) of the indictment." And counsel then says that the word "illegal" as used in the indictment means "unlawful", and he continues, "Hence the indictment in the case at bar, considered as an indictment for all the alleged illegal acts, including the single illegal act which is a criminal offense, is bad, at any stage of the proceedings in this cause, either in the trial court or the Appellate or Supreme court, unless some one or more of said illegal acts are shown to be unlawful acts, and unless, even if some one or more of said illegal acts are such unlawful acts, it sets forth every one of the ingredients of some one or more of such unlawful acts, because not one of said illegal acts is a well-known crime, that is, a crime whose elements are well known." We are unable to follow this argument because whether the offense charged constitutes a well known crime or one that was not well known, would make no difference, because the filing of the documents

with the Secretary of State by the defendants as officers of the Checker Cab Manufacturing Corporation, with a view of selling the cab company's securities was required by the Illinois Securities act as a condition precedent to the sale of the securities by that Act, the false statements as to the assets of a corporation is made a misdemeanor and punishable as such. If the evidence was sufficient to warrant the jury in finding beyond a reasonable doubt that the defendants did misrepresent the assets of the Checker Cab Manufacturing Corporation, then the defendants were guilty of violation of the Illinois Securities Law and if they conspired to do the acts complained of, they would be guilty of a violation of Sec. 46 of the Criminal Code, which provides that if any two or more persons conspire or agree together to do any illegal act injurious to the public trade, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, shall upon conviction be fined not exceeding $2,000.00 or imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined or so imprisoned in the county jail or penitentiary.

Since the acts complained of show that the defendants were guilty of a misdemeanor in violating the Securities Law, and since the evidence shows that they conspired to do the acts complained of, they were guilty of violating provisions of Sec. 46 of the Criminal Code, provided the evidence shows that what they did was injurious to the public trade as mentioned in Sec. 46. We are of

the opinion that offering to sell and selling stock of the Checker Cab Manufacturing Corporation to the public who had a right to rely upon the information disclosed by the documents filed with the Secretary of State as to the assets of that corporation, would tend to defraud the purchaser of such stock, and therefore, be injurious to the public trade within the meaning of the public statute.

In the case of Stewart v. Brady, 300 Ill. 425, the court said,(p.437) "This Securities Law is aimed at the sale and disposition of fraudulent securities, of securities of fictitious value, of securities by persons or under circumstances likely to result in loss to the purchaser through his being cheated. It was not intended to bring all securities under the condemnation of the act, or transactions by all persons, or transactions under all circumstances." And continuing the court said, (p.442) "While the privilege of engaging in a lawful business is the right of every individual, it is subject to the police power and must be exercised in accordance with the requirements of statutes passed in exercise of that power for the protection of the public, * * * The object of the law is to protect the public from the dishonesty, incompetence, ignorance and irresponsibility of persons engaging in the business of disposing of securities of uncertain value whereby the inexperienced and confiding are likely to suffer loss." With this object of the law in mind, we think that the acts complained of, as disclosed by the record, were injurious to the public trade. A number of other contentions are made that the indictment is bad, but we think none of them is of any substantial merit.

The defendants next contend that the court erred in receiving improper and illegal evidence on behalf of the people and in refusing to strike out divers portions of it. The record discloses that practically all of the evidence offered by the people was objected to. The objections being at great length, and in fact almost every question was objected to throughout the trial. Most of the objections were based on the proposition that the indictment was bad. But since we have held that the indictment was sufficient, the action of the trial judge in receiving the evidence was not improper. It would be impossible to keep this opinion within reasonable limits and pass upon all the contentions made by the defendants in this respect, and we think it would serve no useful purpose for us to do so. But it is sufficient to say that we are of the opinion that the evidence admitted was proper for the consideration of the jury, and since it established beyond all question that the assets of the Checker Cab Manufacturing Corporation were a great deal less in value than was indicated by the documents filed with the Secretary of State and there being no evidence to the contrary, any error that might be committed in the ruling of any particular question ought not to work a reversal of the judgment.

The court gave seventeen instructions on behalf of the people and twenty-nine on behalf of the defendants, and the defendants contend that the court erred in giving peoples instructions No. 4, 6. 7, 8, 9, 10, 12, 13, 16 and 17.

Instruction 17, which is first complained of, instructed the jury as to the form of verdicts in case they found the defendants or either of them guilty or not guilty. Those forms

in case the jury found the defendants or either of them guilty, were to the effect that if the jury found the defendants guilty of conspiracy "in manner and form as charged in the indictment", etc. It is said that this instruction was wrong and contradictory of instruction 33, given on behalf of the defendants, which told the jury that the prosecution under the direction of the court had elected to rely upon the first count only of the indictment and then directed the jury to dismiss from their consideration the second and third counts of the indictment. During the progress of the trial, the court compelled the people to elect to proceed under the first count only, so that the evidence was offered under that count. We think it clear that the jury could in no way be misled by instruction 17, because it is clear that the indictment on which the case went to the jury consisted of the first count only.

Instruction 4 defined reasonable doubt and concluded "The reasonable doubt that the jury is permitted to entertain to authorize an acquittal must be as to the guilt of the accused on the whole evidence and not as to any particular fact in the case not necessary to constitute the crime charged." We think that the instruction is inaccurate and ought not have been given. But since there can be no question about the correctness of the verdict and judgment, they ought not to be disturbed. The People v. Halpin, 276 Ill. 363.

Instruction 6 was on the subject of circumstantial

evidence. Counsel for the defendant state that this is a stock instruction which is given in criminal cases where the evidence is wholly or partly circumstantial and that it works no injury in a case, "where the commission charged is conceded or not disputed", but that it is prejudicial in such case as the one at bar where the cardinal issue is whether the crime charge was committed. Since we have held that the undisputed evidence shows that the crime was committed, then the instruction could not prejudice the defendants.

Instruction 7 was abstract in form and defined conspiracy. Instructions 8, 9 and 10 were on the same subject. We think the court ought not to give so many instructions on one subject, but we are also of the opinion that the giving of them did not prejudicially effect defendants.

Instruction 12 told the jury that in determining the question as to whether there was a conspiracy that they should take into consideration the relation of the parties etc. We think there was no error in the giving of this instruction.

By Instruction 13, the jury were told that in determining the question of the guilt of the defendants they had the right to take into consideration, if they found a conspiracy had been proven, the act or declaration of one of the conspirators done or made in the prosecution of the common enterprise, as evidence against all of the conspirators. We think this is in accordance with the law.

Instruction 16 told the jury that the intent alleged in the indictment must be proven, but that it was not necessary to do so by direct positive evidence, that the intent might be inferred from facts and circumstances shown by the evidence. We think there was no error in the giving of this instruction.

It is also contended that the court erred in refusing to give instructions 1, 2, 3, 5, 7, 8, and 34 requested by the defendants. The court gave seventeen instructions on behalf of the people and twenty-nine at the request of the defendants, a great many more than should have been given, as the giving of such a number of instructions tends more to confuse than to enlighten the jury in arriving at a proper verdict. We have examined all of these instructions and are of the opinion that they were all properly refused. A reading of all the instructions given, leads us to the conclusion that theinstructions given at the request of the defendants were certainly all that they could reasonably expect.

Complaint is also made that the court erred in delivering to the jury for their consideration three certain exhibits, same being ledger accounts of the State Commercial and Savings Bank with Morris Markin, because they were not received in evidence but were only referred to by witnesses to refresh their recollection, and were simply marked for identification. In the record these appear marked as Peoples exhibits 1, 2 and 3 of the State Commercial and Savings Bank, it does not show that they were merely referred to by way of identifica-

tion. They tended to show that the Markin Auto Body Corporation owed money to this bank and the evidence showed that this was assumed by the Checker Cab Company. We think there was no error in permitting the jury to take these exhibits and we are unable to say that they would prejudice the defense, since witnesses testified that there was an indebtedness due by the Markin Corporation to the bank, and theevidence further shows that this was assumed by the Checker Cab Company.

It is next contended that the defendants were deprived of a fair and impartial trial by the conduct and remarks of the prosecuting attorney throughout the trial, and questions which the prosecuting attorney asked and what he stated at different times during the trial are pointed out in great detail. We have considered all the argument made in this respect and are clearly of the opinion that nothing complained of in this respect would warrant us disturbing the judgment.

The defendants next contend that the court erred in overruling their motion for a new trial, because the evidence failed to prove that either of the defendants was guilty of the conspiracy charged in the first count of the indictment. We have heretofore set forth the substance of the evidence which is uncontradicted and are clearly of the opinion that it shows beyond any doubt that the document filed by the two defendants with the Secretary of State did not show the true assets of the Checker Cab Manufacturing Corporation as the law required, and that what they did

was a violation of the Illinois Securities Act, and also a violation of Chap. 46 of the Criminal Code.

The judgment of the Criminal Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

157 - 30004

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MORRIS MARKIN,
Plaintiff in Error.

239 I.A. 669

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

Opinion filed Dec. 2, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

We have this day filed an opinion No. 30003, People v. Glassberg, where we have passed upon all the points made by the defendant Markin in the instant case, and for the reasons therein stated, the judgment of the Criminal Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Opinion filed Dec. 8, 1885.

9 - 28386

HENRY P. KRAFT and JACOB KRAFT,
Defendants in Error,

v.

ALBERT FUCHS,
Plaintiff in Error.

239 I.A. 669

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Dec. 2, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On January 23, 1923, the plaintiff, Henry P. Kraft, brought suit in the Municipal Court against the defendant, Albert Fuchs, for $1934.25, an alleged balance due for labor and materials furnished at the request of the defendant. There was a trial, before the court with a jury, and a verdict and judgment for the plaintiff in the sum of $1700.74. The defendant prosecutes this writ of error to reverse that judgment.

The plaintiff filed a statement of claim and a bill of particulars. It set up a charge of $2784.25 for labor, and material and a credit of $850.00, leaving a balance due of $1934.25. The defendant filed an affidavit of merits in which he denied that he had requested the plaintiff to furnish material and labor as set up in the statement of claim, but alleged that "he entered into a contract" with them to do certain work and furnish certain material for $1500.00; and that although the plaintiffs

did part of what was contracted for, they failed to complete the contract. He alleged further that he had paid $850.00, but alleged that it was on account of the contract price. A claim of set-off was filed by the defendant, but it was subsequently withdrawn.

By order of the court, the papers and pleadings were amended so as to make Jacob Kraft an additional party plaintiff.

All the evidence in the case consists of the testimony of the plaintiff, Henry P. Kraft and certain exhibits. The defendant did not testify. The cause was tried on the short cause calendar.

The testimony of Henry P. Kraft is at times somewhat confusing, but it is apparent that he did not understand English very well, and that whatever discrepancies his testimony suggests are explicable on that theory. His evidence shows that services and materials were furnished to the defendant in the re-decoration of a house at 700 Bittersweet Place, which belonged to the defendant. He testified categorically on cross-examination, that they were not working under any contract. He further testified that he had a conversation with the defendant about September 13, 1923, in which the defendant told him that he had some work for him, Henry P. Kraft, and if he wanted to do it, to show up, and that he, the defendant, "wanted" to pay him every Saturday as the work progressed. That is not consistent with the existence of a written contract.

He further testified that about the 13th day of September, 1923, he had a conversation with the defendant at their summer camp, and that the defendant said he had some work for him, and if he, Kraft, wanted to do the work, he should show up and that he would pay him every Saturday as the work progressed; that he, the witness, told the defendant that if that was the case he would be there; that the defendant said the work pertained to the remodeling of two flats at 700 Bittersweet Place. When the witness was asked if he had any conversation in regard to the price of the work, he answered in the negative, and said that the defendant sent him a specification that he should figure on; that he found a blue print of the premises of 700 Bittersweet Place, and figured according to that blue print; that he made his figures with his son Jacob Kraft.

He further testified that before he went to work on the house, he had a conversation with the defendant, in which the latter asked him to send him an estimate, and that he, together with his son took over to him, the defendant, an estimate which amounted to over $3,000.00, and the defendant said he would let him know; that later, he sent the defendant a statement of what he could do for $1500, and after that the defendant sent that statement back to him "with everything written on what he stated he wanted for $3,000;" that his son took it back to him; that while it was in the plaintiffs' possession, they had a photograph made of it. That document with the changes made by

the defendant underscored, is as follows:

"For Decorating of Residence,
700 Bittersweet Pl.
All Radiator old, new 2 coats paint color as Room all Closets painted light.
1st Floor: 2 front doors and entree: clean trim and give 1 coat of dull varnish, walls, canvassed paint and stipple, ceiling tinted.
Living room: Ceil tint, walls painted and stipple, clean panels and trim dull coat, also beams on ceiling paint, & grain 1 door.
Front Porch: Paint walls and woodwork green. stipled
Dining room: Ceiling patched and painted, walls painted and stippled. rear burlaped as in Front woodwork wash and 1 coat dull varnish. Grain 2 doors.
Kitchen & Entree: Ceil wash and tint, sanitas fur by owner woodwork washed and 1 coat of varnish.
3 Bathrooms: wash and tint ceilings, walls. Sanitas by owner, washed and woodwork white, enameled stacin Baseboards.
5 Bedrooms: Ceilings washed and tinted. Walls papered furnished by owner. Woodwork white, enameled and 4 closet doors grained, not the white side.
Rear Halls: Ceiling tint, walls washed and painted, wash & varnish trim.
Frt. Strs, and Hallway: Ceiling tint, walls canvassed paint and stippled, wainscoating burlaped marblizing, wash and varnish trim 1 coat dull.
Reception Passage: Ceil tint, walls wash paint and canvass stipple, trim white.
2nd Floor: Rear Halls: wash and varnish trim, wash and paint ceil and walls.
Living room: Ceil wash and tint, walls papered furnished by owner, woodwork washed and dull varnish
Reception Dining room: same finish as the Living-room Porch: green paint as 1st Floor.
4 Bedrooms: Ceil wash and tint, walls papered furnished by owner. Woodwork white, except baseboard, no white baseboard anywheres.
2 Bathrooms: Ceil tint, walls painted and stippled, woodwork white.
Rear Stairs: Wash woodwork and varnish 1 coat. Laundry in basement whitewash.
3rd Fl. Bedrooms: paper ceil, walls and border, furnished by owner, Wash and paint woodwork.
1 Bathrooms: Washed and painted, clean 8' marble.
Outside Painting: of all windows white, and cornice with beams between the press brick brown color, to receive 2 coats of paint.
For the sum of $1500.00
Al W. Fuchs.
payable as the work progresses every Sat. All paper borders and varnishes furn. by owner
floors not included extra if done by this contractor

There was offered in evidence a letter dated August 24, 1922, signed by the defendant, which was sent to the plaintiff and which was written in German. The translation of it as it appears in the record is as follows:

> "Notwithstanding I can forget should you have time to decorate my house of 24 rooms in andoutside then neglect the camp for the time being. Follow the advice of a good friend. Also on my theatre, also 700 Bittersweet Place, * * * Write immediately if you have time. I will see you at once."

Following the signature are the words, "Money every Saturday."

There was, also, offered in evidence a letter dated September 13, 1922, sent by the defendant to the plaintiffs, written in German, which is, as it appears in the Record in English, as follows:

> "See me about the extras. I do not want to spend more than $1500.00. Probably you can make proposition. Have three plans where we can cut billiard room plain ceiling front parlor done three ceilings but paint it. The radiators no bronze, some canvas, etc. Maybe you can do it for $1500.00. Then commence."

On December 13, 1922, the defendant wrote to the plaintiffs, and in that letter purported to quote what the plaintiffs had said. The words in that letter which are pertinent and which are quoted as having been said by the plaintiff are as follows: "Man, what do we need a long contract? I make the house for you as it should be and first class shop in and outside. Tell me only how you want it done." Quoting those words as defendant did, suggests very strongly that no express contract in writing ever came into existence. On December 16, 1922, he sent what purported to be a check, payable to the plaintiffs for $400. There was written on the check a condition

Following the signature are the words, "Money every Saturday."

that it was payable "only on the condition marked on this check in front and rear to settle a dispute for extra time and material in full to date, and to firnish the BB of all decorating of 700 Bittersweet." There were also offered in evidence two checks, dated November 4 and November 25, the first for $500, and the other for $300. One of them contained the words "Painting Contract," and the other "To payment on contract." Henry P. Kraft testified on cross-examination, "We are not working under any contract." He stated further that he was a union man and worked eight hours a day on the union scales of wages, $1.25 per hour, and that he charged $1.50 in his bill, and 25% on top of that for supervision; that he was the superintendent; that some of the time in the 1164 hours was his time, for which he charged 25%; that his son was his partner.

It will be seen from the foregoing that the evidence does not show that an express contract for a particular sum was proven; on the other hand, that it does show that plaintiffs furnished material and labor and superintendence of the value of $2784.25, and that they received thereon the sum of $850.00, leaving a balance still due of $1934.25.

There is no evidence tending to show that the work and material were not furnished. There is some argument that the plaintiff Henry P. Kraft, when he testified spoke tof "extras" and that there could be no such thing as extras unless there was a contract which fixed and determined the specific labor and material to be furnished. That is not tenable, however, as it is quite obvious from the lang-

usage used by the witness that when he used the word extra he merely had reference to work and material that was ordered from time to time, as the work went on, by the defendant that was unexpected, and, therefore, in a sense additional. The evidence does not show that the document dated September 14, 1934, ever became a contract between the parties.

Considering that the evidence was submitted to the jury and that although the testimony of Henry P. Kraft is at times ambiguous, we do not feel that we are justified in overriding their verdict. The plaintiff sued on a quantum meruit for the reasonable value of the labor and material furnished, and that, we think was established by a preponderance of the evidence. The judgment, therefore, will be affirmed.

AFFIRMED.

THOMSON, P. J. AND O'CONNOR, J. CONCUR.

339 - 29756

MARY GARVEY,

Appellee,

v.

CHICAGO RAILWAYS COMPANY, a corporation, et al on Appeal of CHICAGO RAILWAY CO.,

Appellant.

239 I.A. 669

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Dec. 2, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On July 31, 1922, Mary Garvey, the plaintiff brought suit for damages for personal injuries alleged to have been received as the result of a collision between a street car and a Yellow Cab, in which she was a passenger, and on May 15, 1924, she recovered a verdict against the defendants, Chicago Railways Company and the Yellow Cab Company, in the sum of $35,000.00. There was a remittitur of $9,000.00, and a dismissal of the Yellow Cab Company; and judgment was then entered for $16,000.00 against the defendant, the Chicago Railways Company. This appeal is from that judgment.

The declaration consisted originally of seven counts. There was a dismissal by the plaintiff as to the second, fourth and fifth counts. The first count charged that the defendants, the Chicago Railways Company and the Yellow Cab Company so carelessly, negligently and improperly drove, operated and controlled the street car and the taxi-cab that they came into violent collision, and as a result

Opinion filed Dec. 3, 1935.

the plaintiff was injured. The third count contains charges similar to those in the first and states that the negligence of the defendants was joint and several. The sixth count adds the charges that no proper warning was given by the Chicago Railways Company, and that it failed to keep a proper watch and lookout for persons and vehicles lawfully upon the highway. The seventh count charges a dangerous rate of speed, and joint and several negligence. The ad damnum was originally $25,000.00, but was afterwards increased to $50,000.00. Both the Chicago Railways Company and the Yellow Cab Company pleaded not guilty. On May 5th, 1924, the trial began, and on May 15, 1924, the jury returned a verdict finding the Chicago Railways Company and the Yellow Cab Company guilty and assessing plaintiff's damages at $25,000.00. On May 21, 1924, it was ordered that the defendants be required to file written motions for a new trial within eight days. On June 21, 1924, on motion of the Chicago Railways Company, leave was given to the Chicago Railways Company to file instanter written exceptions to the instructions. That was excepted to by the plaintiff. On July 16, 1924, upon the suggestion of the court, the plaintiff remitted $9,000.00 from the verdict and asked judgment for the balance of $16,000.00. On the same day upon motion of the plaintiff, it was ordered that leave be given to amend all papers and proceedings by dismissing without costs as to the defendant, the Yellow Cab Company. On the same day, motions for a new trial, and in arrest of judgment having been made by the Chicago Railways Company, they were overruled and exceptions taken. Judgment was then entered against the Chicago Railways Company in the sum of $16,000.00. From that judgment,

as we have said,
/ the Chicago Railways Company prosecutes this appeal.

The following reasons are urged why the judgment should be reversed; (1) that the evidence did not sufficiently show liability; (2) that the court erred in admitting evidence of the contents of lost X-ray pictures; (3) that the court erred in giving instructions; (4) that the amount of the judgment is excessive; (5) that there was a settlement, after verdict, between the plaintiff and the Yellow Cab Company, a co-defendant of the Chicago Railways Company, of which the court refused to admit evidence on the motion for a new trial.

(1) Was the finding of liability contrary to the weight of the evidence? The collision took place a few minutes after 11 P.M. March 5, 1922. The plaintiff was an unmarried woman, 34 years of age, of good health, and from 1913 had worked continuously at the Boston Store. She lived with her two sisters at 829 Wellington avenue. On the night in question the plaintiff and her sister Anna Garvey were visiting a cousin at 1414 Garfield avenue. About ten o'clock they hired a taxi-cab of the Yellow Cab Company, got in and started to drive home. The taxi-cab was driven from 1414 Garfield Boulevard east to Halsted street and then north on Halsted street to Oakdale avenue. The collision took place within the intersection of Halsted street and Oakdale avenue. Halsted street is a north and south street, and contains street car tracks belonging to the defendant. Oakdale avenue, an east and west street, crosses Halsted street, but not in a straight line. Oakdale avenue as it meets the east line of Halsted street, is 15 feet north of where it meets Halsted

as we have said.

street on the west line. The next street north of Oakdale avenue is Wellington avenue. The home of the plaintiff and her sister, 828 Wellington avenue, was on the south side of that avenue, a short distance west of Halsted street.

The taxi-cab was driven by Harry Miller, who was about 26 years old, and had been a Yellow Cab driver for about two years. The northbound street car was driven by one Coleman, who had been a motorman for 18 years. He was 42 years of age; but died prior to the time of the trial. On the street car, in addition to the motorman, there were, at the time in question, three passengers and the conductor, all of whom were inside, save one passenger, who was on the front platform, standing beside the motorman. The street car was a double-truck car, about 48 feet long, and weighed about 37 tons. The night was clear and somewhat cold and the street car rails frosty and, according to some evidence, slippery and "greasy."

The street car and the taxicab, the former behind the latter, were going in the same direction, north, and the collision took place in the area of the intersection of the two streets. It is urged for the defendant that the collision was caused (1) by the taxicab starting to turn out of the track, moving altogether out of the north bound track, then stopping and then being suddenly backed onto the car track where the street car was so close it was impossible seasonably to stop the street car; or (2) by suddenly stopping the taxicab without the driver extending his arm as a signal to following traffic, as required by statute and ordinance;

or (3) by stopping the taxicab in the car track, then starting to move forward a short distance, and then again stopping the taxicab on the car track when the street car was only 15 feet away.

The testimony as to what transpired is very complicated and highly conflicting. One Mollensteiner, a Northwestern University student, who was standing on the southeast corner, testified that he saw the taxicab standing on the north bound track; that he did not know what made it stop; that when he first saw the street car it was from 25 to 30 feet from the taxicab and was traveling at about 30 miles an hour; that the street car came up and bumped the taxicab in the rear and pushed it about 25 to 30 feet over to the west side of the street; that the collision made quite a loud noise; that it was a clear night and the place was lighted with an electric light, which was burning brightly, and which was on the northwest corner. He further testified that he did not know what made the driver stop, nor whether he backed up or turned around, or what he did, save that he stopped.

One Ludwig, who was a police officer at the time in question, and, at the time of the trial, a special police officer for a bank, testified that he was riding on the street car and was standing on the front platform on the left or west side of the motorman and talking with him; that the street car was going north about 20 to 25 miles an hour; that he first noticed the taxicab when the street car was about two blocks south of Oakdale avenue and the taxicab was about a block ahead of the street car; that as the street car went

on and was within about 50 feet of the taxicab, he saw plainly the latter standing still in the street car tracks, the rear end of the taxicab at that time being about the center of that part of Oakdale avenue that extends west; that at that time the motorman first put on the brakes; that they were applied so suddenly all the wheels were locked; that the street car struck the taxicab and pushed it three or four feet; that the collision broke the glass in the rear of the taxicab; that the noise was such it could be heard a block away.

He further testified that he, also, saw a Town Cab going south in the west bound track and when he first noticed it, it was just about past the taxicab in question; that there were no other vehicles there; that the street car was almost stopped when it struck the taxicab; that if it had had about five feet more it would have stopped without colliding; that at the time of the collision it was going about 8 miles an hour; that the motorman made every effort to stop the street car; that the collision moved the taxicab 3 or 4 feet; that the tail light on the taxicab was burning; that the streets were well lighted; that the rails had frost on them and were slippery and "greasy"; that the street car slid a little; that the bell on the street car was not rung. He further testified that just before the motorman put on the brakes, he, the motorman was not looking ahead; that he turned his head toward one side and looked toward the right; that he, the witness, did not see any hand extended from the taxicab, nor any warning light that it was about to stop.

One Schubert, a chauffeur of the Town Cab Company

was dark enough for the enemy to see it was about to start.

The minutes ticked away. Then the engines roared into life and the whole squadron began to taxi out to the runway. Each plane was to take off at 30 second intervals. Ahead of them, the first plane was already moving down the runway, gathering speed. Then it was airborne, and the second plane was following it. Then the third, and the fourth, and so on, until the whole squadron was in the air.

Once they were in the air, they formed up into their battle formation, and headed out to sea. Then they turned and headed back towards the coast, and the enemy.

Ahead of them, the sky was filled with the black puffs of anti-aircraft fire, and Spitfires and Hurricanes were weaving in and out of the flak, trying to get at the bombers before they reached their targets. Then the squadron leader's voice came over the radio telling them to attack.

Then the Spitfires were diving down on the bombers, and the sky was filled with the noise of machine guns firing, and cannons roaring, and the smell of cordite filling the cockpit. Then the bombers were gone, and the fighters were climbing back up into the sky, looking for more enemy aircraft to attack.

testified that at the time in question he was driving a Town Cab west on the east side of Oakdale avenue; that when he got to the northeast corner of the intersection, he stopped; that when he first saw the taxicab it was standing still on the street car track, headed north, at about the south line of the intersection; that he, himself, then, in second speed, drove the Town Cab straight west to the other side of Halsted street, and turned south; that he did not see the street car while he was making the turn, but first saw it when he was driving south and it was about 15 feet to the rear of the taxicab; that before the collision the taxicab started up and went from 10 to 15 feet to about the center of the intersection; that it was turned slightly as if going to turn into Oakdale avenue, and then stopped suddenly; that the street car was then almost against the taxicab; that when the street car struck the taxicab the latter was pushed somewhat to the west over against the Town Cab, and its left front wheel hit the left rear fender of the Town Cab. He further testified that when the taxicab was standing still, the driver was holding the door open and was talking to the passengers. As to the motion of the street car in relation to the stopping of the taxicab, he testified that after it slowed down it started up again, apparently implying that while the taxicab was first standing still the street car slowed down, and that after the taxicab started up again the street car accelerated its speed. A passenger, Mrs. MacTaggart, who was in the street car, seated near the front on the left hand side, testified that the first unusual thing she noticed was that the street car, after it started up after stopping at Oakdale

avenue, so suddenly stopped. She further testified that she heard the car bump something and heard the breaking of glass; that she went out into the front vestibule and saw the taxicab facing northwest, with the rear wheels on the car tracks. As to the motions of the street car, she intimated that it did not come to a full stop at Oakdale avenue.

The conductor of the street car, Neupel, testified that as it approached within 100 feet of Oakdale avenue, the bell was ringing and the car was coming to a stop; that when it was about 10 feet from Oakdale avenue, he looked out from the side, but saw nothing; that the motorman put on speed again and went from about one mile an hour up to 4 or 5 miles an hour; that after the street car had then gone about 20 or 25 feet, he felt the car stopping and he heard the crash of glass. He further testified that he did not know why the street car slowed down to about a mile an hour; that no one got off the back; that prior to that the speed was not more than 15 miles an hour; that after first slowing down, it picked up speed in the next 25 feet; that he felt the brakes applied suddenly; that at the time of the crash it had slowed down to less than a mile an hour; that it stopped within 3 to 5 feet after the brakes were applied.

One Miller, called by the Yellow Cab Company, a young man 26 years of age, an ex-soldier, who had driven automobiles for about 10 years, and was an employee of the Yellow Cab Company, testified that he drove the taxicab in

question with two passengers, the plaintiff and her sister, from Garfield Boulevard; that he went north on Halsted street to Oakdale avenue; that as he went north he had passed the street car in question, south, at Fullerton avenue; that at the time he stopped at Oakdale avenue he looked behind and the street car seemed to be about a block away; that at Oakdale avenue there was a Town Cab coming into Halsted street from the east on Oakdale avenue and he stopped, with the rear of his taxicab near the center of the intersection about in line with the center line of Oakdale avenue as it goes west, with the front wheel in the north bound street car tracks, cramped to the left; that he put out his hand as a signal before he stopped; that he stood there a half or three quarters of a minute while the Town Cab went 60 or 75 feet; that he was waiting to turn west into Oakdale avenue; that after he came to a stop he did not move his taxicab until it was struck; that the collision drove the taxicab forward to the northwest 6 or 8 feet, and the left front fender struck the rear fender of the Town Cab; that while standing there, he did not hear any signal from the street car; that while stopped, before the collision, he did not speak to his passengers or open or shut either of the doors; that the collision broke the glass in the rear window of his taxicab and bent the spare tire rack back in "flush"; that at Oakdale avenue he intended to turn west then north on Mildred avenue, then east on Wellington street to take the taxicab to 829 Wellington street which is on the south side, to save the noise of backing up and turning around at

that hour of the night. He further testified that when he got to the south line of Oakdale avenue, the Town Cab headed west, going at 6 to 7 miles an hour, was just entering Halsted street; that at that time the distance between the two cabs was about the width of two streets. When asked whether he had to stand in the street and wait for the Town Cab to go by, he answered, "Why take a chance?" He further testified that he stopped because the Town Cab coming from the right, had the right of way; that he decided he would obey the City ordinance and go over to the right side of the street and make a square turn; that he "cut" over within three feet of the north curb so that his front wheels would be within three feet of the north line of Oakdale avenue extending west; that there was nothing in the center of the street to prevent him making the turn and going right on.

The plaintiff, Mary J. Garvey, testified that when the taxicab came to Oakdale avenue, and the front wheels were near the north curb, it turned west to go on Oakdale avenue, and as it was doing so, she knocked on the window and said, loudly, "One block further north, please;" that the driver stopped for a second, or for a few seconds, and then he "twisted" and backed up a little, on to the tracks, "to right himself going north again;" that he backed on the south bound track to right himself and to get on the north bound track again; that after he had stopped on the north bound track, probably for a few seconds - between 5 or 8 - a terrible crash came. She further testified that she did not know whether, when he started to turn

into Oakdale avenue, he cut the corner short; that she did not notice whether he was back of where he started to turn, when he got back on the north bound track. She further testified that when it turned it was towards the north; that the front wheels were near the north curb when it turned to the west; that the rear wheels went on the south bound track; that she did not notice further how far back of where he started to turn when he got on the north bound track; that she did not know how far south he moved in backing up and getting on the track; that when the collision occurred the taxicab was standing still.

The sister of the plaintiff, Anna Carvey, testified. Her testimony is not a simple, consistent statement of facts, but is confused and conflicting, and suggests incapacity of observation and lack of ability, upon examination, accurately to describe the occurrences, or an unwillingness to do so. On direct examination she testified that when the taxicab reached Oakdale avenue, it made a left turn and when on the south bound track, her sister rapped on the glass and said, "One block farther north;" that the crash seemed to occur in a second after her sister rapped on the glass. She further testified that when her sister rapped on the glass the taxicab was on the south bound track; that the driver backed out on Halsted street; that the back of the taxicab was as far as the north bound track; that then he stopped it and there was a terrible crash. On cross-examination she testified that the taxicab turned west when it was 5 or 10 feet from the north curb of west Oakdale avenue; that the taxicab, when it

turned, got off the street car tracks; that her sister rapped on the window when he turned, and the taxicab stopped for a couple,or 3 seconds or so; that the driver did not open the door; that at that time the taxicab was headed west; that it turned and proceeded north. When recalled for further cross-examination, she made some changes in her testimony, and stated that she had formerly been confused. One change pertained to the stopping of the cab. She testified that there was no snow, that it was a nice night and that the street was dry; that when the taxicab had turned west and stopped, it was partly in the south bound street car tracks and was close to the southwest corner; that there was nothing to prevent it being turned from where it stopped, to the right in Halsted Street; that the driver threw his gears into reverse and backed up; that it came to a standstill and then he backed it on to the north bound track and stopped; that it came to a standstill on the north bound track before the crash; that when it came to a stop it was facing north; that there were two stops, one after he first turned, and one after he had backed on to the street car tracks; that from the time the taxicab started to back up until the crash occurred was about eight seconds; that the taxicab was stopped on the north bound track perhaps 6 or 5 or 8 seconds. Her testimony on this subject is somewhat confusing, but it seems to suggest that in her opinion the taxicab, after it backed on to the north bound tracks, stopped there from 5 to 6 seconds before the collision occurred.

The question arises whether the verdict was against the weight of the evidence? If in our judgment it is, then the cause must be remanded for a new trial. Mirich v. Forschner Contracting Co., 312 Ill. 343; Wallace v. Odell, 314 Ill. 485; Roe v. Roe, 315 Ill. 130; Minopoli v. Chicago Rys. Co., 316 Ill. 609.

The only theory upon which the verdict may be justified is that the taxicab was driven to Oakdale avenue and made a turn to the west, then stopped, and backed or turned on to the north bound street car tracks and while standing there reasonably visible to the motorman, was run into by the street car because the motorman failed in the exercise of appropriate care. That the taxicab turned to the west when it reached Oakdale avenue and then, after the plaintiff had rapped on the window and given directions to go one block farther north, was driven on to the north bound tracks and stood there for some seconds before the collision is supported by the testimony of the plaintiff and her sister. Nor is the testimony of Ludwig and Hollensteiner inconsistent with those facts. Ludwig said that when the street car was within 10 feet of Oakdale avenue he plainly saw the taxicab standing still in the car tracks, the rear end being at the center line of Oakdale avenue, west. At the time of which he speaks it may well be that the taxicab had already returned to its final position in the north bound tracks. Although, near the close of his examination, he said he did not remember what the taxicab driver did, whether he stopped or started or backed up or anything else,

it is a fair inference from all his evidence, and from the reiteration of the fact that he gave it as his recollection that the taxicab was standing still when the street car was 50 feet away.

Hollensteiner, who was in a good position for observation, said that he saw the taxicab standing on the north bound track, and when he first saw the street car, it was 25 to 30 feet away, and that he did not know the reason why the taxicab stopped, nor whether it backed up or turned around.

The testimony of Schubert, who drove the Town Cab is not consistent with that of the plaintiff and her sister. He said that when he first saw the taxicab it was standing still on the north bound track; that he then drove straight west to the other side of Halsted street and turned south; that he first saw the street car when he was driving south and it was about 15 feet behind the taxicab; that before the collision the taxicab started up and went 10 to 15 feet to about the center of the intersection and then stopped suddenly; that the street car was then almost against the taxicab; that when the taxicab was standing still the driver had the door open and was talking to the passengers.

The testimony of Mrs. MacTaggart is not inconsistent with that of the plaintiff and her sister. That the street car slowed down as it neared Oakdale avenue and then accelerated its speed, may corroborate Schubert's version, but it does not necessarily conflict with the evidence of the sisters.

And the same is true of the testimony of the conductor. He said that as the street car approached Oakdale avenue it was stopping, though no one got off; that it then increased its speed from one to five miles and hour, and then after it had gone 20 to 25 feet, the motorman suddenly applied the brakes, and he felt it stopping and then heard the crash.

Of course, the evidence of Miller, who drove the taxicab is inconsistent with that of the plaintiff and her sister. By itself, it is manifestly against the weight of the other evidence. The verdict, if it is to be supported, must rest on the other evidence and not on his. If Ludwig, who was standing beside the motorman, plainly saw the taxicab standing still when the street car was 50 feet back of it, it must be assumed that the motorman, exercising reasonable care, also saw it; and if he did, he had, even if the rails were slippery and "greasy", sufficient time to stop, unless the street car was, under the circumstances, going at an excessive rate of speed. And even if the motorman made every effort to stop the car, his conduct would still not be free from negligence. The evidence shows that the rear light on the taxicab was lighted, the intersection was lighted, Ludwig saw the taxicab when the street car was two blocks from Oakdale avenue, and the taxicab was a block away, the street car was going, Ludwig said, at 20 to 25 miles an hour, and if the taxicab had turned in towards Oakdale avenue and then had twisted and backed, as the plaintiff says, and stood still on the north bound tracks for some five or six

seconds, it behooved the motorman to have such control that such a collision would not take place. It would be somewhat different if it be assumed that the evidence showed that the taxicab turned back on to the north bound tracks, stood still and then started up, and then suddenly stopped. If such was the fact it would, of course, account for the testimony of the conductor and Mrs. MacTaggart. But the jury may have believed from the evidence that the taxicab was backed on to the north bound tracks and stood still there for some seconds and was then, while standing still, run into through a lack of care on the part of the motorman.

Does a careful study and analysis of all the evidence show that on the question of negligence the verdict is manifestly against the weight of the evidence? We are constrained to conclude that it does not. Ludwig says he saw the lights burning on the taxicab, and so we assume, must the motorman, if he was in the exercise of care. And, in that situation it would have made no difference whether the driver of the taxicab had his hand out or not. If the rails were slippery, that made ordinary care mean greater than ordinary attention as to speed and distance from a vehicle in front. In Szremba v. Chicago Rys. Co., 690 Ill. App. 58, the evidence showed an unexpected stopping of a truck and the court said: "The sudden stopping of the truck so near to the track on which the car was approaching as to endanger the safety of a person in the position the plaintiff was in on the track, was such an unexpected, unusual and extraordinary

occurrence that the law did not require the motorman to anticipate it."

Here, however, there is evidence that the taxicab could be seen to be stopped when the street car was 50 feet away, in time to stop unless going, considering its environment, at an excessive rate of speed.

(2) It is contended that the court erred in allowing Mr. Trostler, an X-ray photographer, to describe the contents of X-ray films that had been lost, and the reason assigned is that there was insufficient proof of the accuracy of the pictures. Dr. Trostler was a physician by profession, but specialized in radiology; and had been in X-ray work as an expert and specialist since a few months after X-rays were discovered. On March 6, 1922, at the Illinois Masonic Hospital, he took 4 X-ray pictures of the neck, spine and skull of the plaintiff. After he took them, they were dried and he examined them, and made a written record of what they showed, and placed them in a steel filing cabinet in the X-ray department. On direct examination he was asked what the X-ray indicated to him as an expert X-ray radiologist. To that, counsel admitting that the absence of the films had been accounted for, objected "to the doctor telling what the plates show because there has been no preliminary proof offered to warrant his reading the plates at all, of which would permit the production of the films if they were here." Further in his direct examination, he was asked if he knew that the machine with which he took the X-ray pictures was from his experience "an accurate machine,

a proper machine." The question was objected to. In his answer, after describing at length the proceedings he went through with in taking the pictures, he said, "This machine that I operated with was not in very good working order. It was an old machine; it was a machine that had seen its best days, being used for many years, but it was used for about a year afterwards. It is not now in use." He was then asked, "Are you able, doctor, from your experience as an X-ray expert, to state whether or not that picture which you took and developed, examined * * * was a correct representation of the cervical spine of this woman?" That was objected to. He answered, "It was a correct representation." He was then asked what it showed. That was objected to. He answered, "It showed what I interpreted as an irregularity in the fourth cervical vertebra consisting of what appeared to be a fracture of the body of that vertebra * * * partial dislocation of the second cervical vertebra upon the third cervical vertebra; that was all the plate of the neck showed." The doctor, also, testified that he did not use a fluoroscope. Was the secondary evidence of the picture competent? We think it was. In objecting to the evidence, especial emphasis is put on the fact that the doctor said that the X-ray machine "was not in very good working order. It was an old machine, it was amachine that had seen its best days, being used for many years, but it was used for * * * about a year afterwards. That evidence does not mean that it was not capable of taking satisfactory pictures. A machine may be in working, or good working, or very good working order. The superlative degree is not necessary.

He testified that the picture that he actually took with that machine was a correct representation of the cervical spine. That implies that in his judgment the machine was able to take, at least, a correct picture. That, as far as admissibility in evidence is concerned, was sufficient.

In Stevens v. I. C. R. R. Co., 306 Ill. 370, the court said, "he must be able to say that he is skilled in the use of the X-ray machine and in taking and developing X-ray pictures, and that he took the picture offered in evidence with the body in a certain position * * * with a machine which he knew to be in good working condition and accurate, and that from his experience he was able to say that the picture produced by the machine was an accurate picture of the internal condition of the body." All those requirements we think were sufficiently complied with. It was not necessary that a fluoroscope should, also, have been used. Ordinary photographs are admissible in evidence, even though the taker pays little attention to the physical things supposedly portrayed. The necessity, specified, that he took the picture "with a machine which he knew to be in good working condition and accurate" was supplied when he said the picture was a correct representation, even though he, also, said that the machine was not in very good working order. His testimony in its essence simply means that the machine was in such working order that it took a correct representation; and that is the equivalent of good working order, though not the equivalent of very good working order.

It is contended that there was no evidence warranting a holding that the doctor was skilled and capable in interpreting X-ray pictures. He was a physician and an expert radiologist, his experience covered the time of the whole history of the art. Reasonably considered, that implies sufficient qualification to justify the admission of his interpretation.

(3) As to the instructions numbered 35 and 15, the giving of which it is claimed constituted sufficient error to justify a reversal, Instruction 35, given at the instigation of the Yellow Cab Company, merely told the jury that the Yellow Cab Company had the right to operate the taxicab in question on the northbound street car track, and were not to infer that that company "was negligent from the mere fact that the taxicab was in the north bound track." The essence of the instruction was information that the driver had the general right to drive in the tracks of the street car company. That was not an obnoxious instruction. It might be urged, in its justification, that the jury without such information, might err in the opinion that the taxicab at no time had any right to drive in the street car tracks. We do not think the instruction was in such form as to mislead the jury. Further, the jury found the Yellow Cab Company guilty as well as the Chicago Railways Company.

Instruction numbered 15, states at the outset that "In determining the amount of damages, * * * if any,

you have a right to take into consideration all of the facts and circumstances you believe are proven by the evidence before you." Following that generalization, however, it states, "you may consider the nature, extent and character of those injuries so far as they are shown by the evidence; and if you find from the evidence that those injuries are permanent and incurable, you may also take this into consideration," and, further, states, "You may also consider any sickness, physical pain and suffering or bodily disability from the evidence she will suffer in the future as a result of such injuries; and you may find for her such a sum as you believe from the evidence, under the instructions of the court, will be just, fair and adequate compensation for such injuries, physical pain and disabilities, if any, you believe from the evidence she has sustained or will sustain in the future as a direct result of the accident in this case, so far as such injuries, pain and disabilities, if any, are alleged in the declaration and you believe from the evidence they are proved on the trial." It would seem, therefore, that the two detailed statements in reality tend to limit and direct the jury to a consideration of those physical injuries "so far as they are shown by the evidence." The instruction would have been more accurate without the prefacing generalization; but taking the instruction as a whole, we do not feel justified in considering it as containing error of sufficient magnitude to justify a reversal.

(4) Did the injuries suffered warrant the

amount of the verdict? The plaintiff testified that the collision was a terrible crash and the next thing she remembered was being in a hospital; that she was nearly insane with a terrible pain in the back of her head; that after she heard the crash she was thrown forward and backwards and her neck or back snapped. Anna Garvey testified that as her sister was being raised up, she screamed out, "My back is broken." The driver testified that when he opened the door of his cab, the plaintiff was on the seat and her sister on the floor; that he drove them to the hospital and carried them in; that there was a wound in the plaintiff's neck; that he got considerable blood on his coat carrying her in; that he placed her on a wheel table and she was taken somewhere on an elevator. At the hospital she was first treated by an interne, and then, about midnight, by Dr. Ellis, who was sent out by the Yellow Cab Company. He testified that he found an abrasion on the back of her head, right side, near the base of the neck, about a quarter of an inch long and covered by a gauze dressing that the interne had applied; that there was no swelling or discoloration; that he examined her quite elaborately and found her normal; that he saw her again the next morning and found her the same as before.

Dr. Doyle testified that he first attended the plaintiff at the hospital about midnight, a few minutes after Dr. Ellis was there; that Dr. Ellis was dismissed from the case shortly after he, Doyle, came; that he found the plaintiff very pale as though in shock, very nervous

as though in fright and pain, with a general appearance of muscular powerlessness; that she complained of pain in the back of her head and back, left shoulder and neck; that he made an examination of her body; that he found a puncture wound on the left side of the back and neck, about an inch in length, a penetrating wound. He further testified that he came back the next morning, and found that Dr. Ellis had been there and left an order for X-ray pictures to be taken; that he, Doyle, found her still pale and in shock, and complaining of pain in the back of her head and neck, and in her left shoulder and left hip; that he left orders for medicine for her to quiet her nerves; that on March 6, he called Dr. Horne, and together they made an examination; that she was put in a plaster cast, extending from her head to her hips, so that the head and shoulders, back and hips were immobilized; that after that she was compelled to lie on her back for three weeks, at the expiration of which time it was taken off; while in the cast, other examinations were made and a disturbance of sensation in the toes of the left foot and fingers of the left hand was found, and after a few days the bladder failed to function and she had to be catheterized for about two weeks; that after the cast was removed she complained of pain in the back of her head and neck, shoulders and back and left hip; that various medicines were administered; that during the rest of the time in the hospital she maintained a nervous jerk and did not want to be touched; that he visited her 3 or 4 times a week after she was taken home, during which time she was in bed. He further testified that he examined her about six weeks before the trial; that she

was still pale; that the muscles in the left cervical region were not pliable normally; that there was about a 25 per cent limitation; that she complained of pain if touched over the 2nd to the 7th cervical vertebra; that she said it caused her pain when touched along the spine over the dorsal and lumbar regions; that he found the reflexes of her knee exaggerated; that he found she could not stand up; that he was still treating her, visiting her every ten days; that he always found her in bed; that he found her legs swollen about the ankles, and she complained of pain in the back of her head, neck and left shoulder; that her eyes had a nervous appearance; that he had made altogether from 175 to 200 visits; a fair charge for which would be $1500.00. Dr. Horn, a teacher of anatomy, who was called by Dr. Doyle the day after the injury, testified that on examination of the plaintiff, he found she was suffering from a broken neck. He called on her, afterwards, 10 or 12 times, while she was in the hospital, and about 8 or 10 times after that. He examined her about a year after the accident, and, also, in March just before the trial. At the last examination, he found, objectively, a stiffness of the neck and shoulder muscles and of the back muscles on the left side, a swelling of the left foot and ankle, a scar over the region of the injury, a fluctuation of the pulse. He testified that the total loss she now has is not permanent; that she is now as bad as she will be; that it is his opinion that within the next 3 or 4 years she should improve at least 50 per cent. and should regain in that time about 50 per cent of her ability to do the things that normal, healthy people do.

Dr. Adams, an alienist, who examined the plaintiff on March 26, 1924, substantially corroborated Dr. Horn as to the objective representations. He testified that in his opinion she had neurosis, neurasthenic in type, that might have come from being injured, from the shock and suffering which follows injury. In answer to a hypothetical question, he said it was his judgment that the condition described was permanent.

Considerable evidence was introduced concerning two sets of X-ray pictures. One set was taken the day after the accident in 1922, and the other in 1924. Those of 1922 were taken by Dr. Trostler at the hospital and are those discussed above. He testified that they showed an irregularity in the fourth cervical vertebra, appearing to be a fracture, and a partial discoloration of the second upon the third. Dr. Horn and Dr. Doyle corroborated Dr. Trostler's interpretation of those pictures. The second set of X-ray pictures was taken by Dr. Trostler on March 22, 1924, shortly before the trial. Examining one of them at the trial, he testified that it showed a fragment detached from the anterior portion of the 4th cervical vertebra. Dr. Horn testified, interpreting one of the pictures of the 1924 set, that it showed a perfectly normal vertebral column with the exception that the 4th vertebra at its upper left showed an outpouring of some substance which was, in all probability, bone, a tissue called osteoclasis; that the picture showed very clearly the bodies of the vertebrae, but did not show the

transverse process. Dr. Doyle interpreted it as showing calcium deposits on the 3rd, 4th, and 5th cervical vertebrae; and as showing evidence of fracture through the 4th cervical vertebra, and that repair had taken place through the formation of callous. He furthertestified that whenever there is an injury about the bones, calcium is thrown out in deposits and lays the ground work for callous.

For the defendant, Dr. Wells, was called, and for the Yellow Cab Company, Doctors Ellis, Jenkinson and McLaughlin. They all testified that the 1924 X-ray pictures showed no signs of a fracture. Dr. Wells, a physician, surgeon, and a specialist in Roentgenology, interpreted an X-ray picture of the 1924 set, as showing no evidence of fracture, nor of traumatic pathology. He stated that it showed on the front of the bodies of the 4th, 5th,6th and 7th cervical vertebrae an excrescence or an abnormal formation of bone, more pronounced on the 4th, and less and less on each of the others, and but slightly on the 7th; that the excrescence, in his opinion, was a chronic bone inflammation, infectious in character and not traumatic in character. He stated that it could be only the result of a callous formation from a fracture of the result of chronic infection or inflammation; and that in his judgment it was the latter because of the regularity, the symmetry, the uninterrupted contour at any point on the bodies of the vertebrae in question; that you could not get such bony callous at the various vertebrae mentioned unless all four of the bones were fractured; that there was

no evidence of subluxation of the 2nd cervical vertebra. He further gave it as his opinion that an injury sufficiently violent to fracture the 4th at its upper anterior portion, or to cause a subluxation of the 2nd, would produce paralysis of all parts supplied by the nerves which either pass through that region of the upper cord or have their nuclear origin there, as well as certain other nerves; that the effect would express itself, first and most prominently in producing a cessation of breathing, requiring artificial respiration, and, second, in motor paralysis of the upper extremities. That opinion was based, he said, on the assumption that the injury was sufficient to involve the spinal cord; and that he could not conceive that a fracture of the 4th and a subluxation of the 2nd could occur from one sudden act of violence without damage or injury to the spinal cord; and that if the history of the traumatic disturbance showed no motor disturbances, the cause of the condition would be disease, such as arthritis or joint inflammation.

Dr. Ellis interpreted the X-ray pictures of 1932 as showing neither a fracture nor a dislocation, but as showing one abscessed tooth. Dr. Jenkinson stated that he could not see anything in them indicating an old fracture, or any subluxation; that he did see osteophytes, or new bone along the 3rd, 4th, 5th and 6th cervical vertebrae; that they were arthritic, and could be caused by disease or fracture. He further stated that the mere tearing of a ligament might cause a bone formation, although there was

no displacement of the vertebrae. Dr. McLaughlin, an interne, who was present and saw the X-ray pictures of 1933, stated that he did not see any evidence of fracture. He stated that he was not an X-ray man.

In the course of the trial, pursuant to the request of all concerned, the trial judge appointed Dr. Meyer to make an examination of the plaintiff. He, accordingly, examined her and had X-ray pictures taken giving both the lateral and straight view of the cervical spine. He examined her quite exhaustively. He testified that he subjected her to talking across the room, which she could do by the aid of a cane; that putting her on his examination table he noticed that it was rather difficult for her to lie in a prone position; that an examination of her neck showed a spasticity of the muscles of the neck; that his examination showed much tenderness over the 3rd and 4th cervical vertebrae; that upon moving her from a prone to a recumbent position, she showed tenderness in the lumbar region. He further testified that the X-rays did not elicit any evidence of an old fracture, but he also stated that it was entirely possible that one or two years after a fracture X-rays may be taken, some of which will show a fracture and others not.

To what extent the jurors considered the conflicting interpretations of the X-ray pictures, we do not know. In view of the verdict, however, we are bound to assume that they did not give full credit to those given by the doctors called for the defendants and by the court. And if they believed those of the doctor's called for the

plaintiff, we do not feel that the evidence for the defendant is so scientifically sound as to cast such doubt on that for the plaintiff as to convince the mind that the verdict is clearly against the weight of the evidence. The argument for the defendant is well made and exhaustive, but not sufficiently convincing.

If her neck was broken, as Dr. Horn testified, and her physical condition was as described by him and Dr. Doyle and Dr. Adams and by the plaintiff herself, she was seriously and permanently injured, and the verdict rendered cannot reasonably be said to be excessive. Considering carefully all the evidence as to her injuries, we are of the opinion that the verdict should stand.

(5) It is contended on behalf of the defendant Chicago Railways Company, that the trial judge erroneously refused to permit counsel for the defendant to show, after the verdict and pending a motion for a new trial, that such an arrangement had been made between the plaintiff and the Yellow Cab Company, that the defendant Chicago Railways Company was released either in part or from all liability.

The record contains the following: "On June 28, 1934, the motion of the defendants for a new trial coming on again to be heard, the court indicated that the motion for a new trial of the respective defendants herein would be overruled upon the entering of a remittitur by the plaintiff of Nine Thousand Dollars ($9,000) from the verdict herein." The hearing of June 28, 1934, was adjourned to July 16.

As to the proceedings which took place on July 16, the record shows the following: "on July 16, A. D. 1924, said motion for a new trial of the respective defendants herein coming on further to be heard, the plaintiff remitted Nine Thousand Dollars ($9,000) from the verdict herein: * ** And thereupon counsel for plaintiff moved the court to dismiss the suit as to the defendant Yellow Cab Company, and the following proceedings were had:

"MR. KEHOE: * * * before judgment is entered, I want to ask on behalf of the Street Railways Company -

"THE COURT: Now, I haven't ruled on the motion (referring to motion for a new trial) I have just indicated what I was going to do.

"MR. KEHOE: Yes, but before Your Honor rules on that I want to make a motion before your Honor passes on the question, - the question before your Honor now, of course, is the question of whether or not to enter a judgment as to the Street Railway Company. Before your Honor passes on that I will ask permission to make a showing as to the terms and consideration for the dismissal.

"MR. O'BRIEN: We object.

"MR. KEHOE: Mr. O'Brien is present here as counsel for plaintiff. He has settled with the Yellow Cab Company, and has made the arrangements for paying the money which has been paid to the plaintiff, and has had plaintiff execute and deliver whatever instrument has passed, suggesting the consideration for the dismissal of the Yellow Cab Com-

pany.

"MR. O'BRIEN: There is no consideration for the dismissal and you know as attorney for the Yellow Cab Company, as well as attorney for the street car company, Mr. Kehoe, any arrangement with the Yellow Cab Company is purely on a covenant not to sue and has nothing to do with the verdict in any way. You know that as attorney for both parties.

"MR. KEHOE: You have had your client - your client has signed and you have delivered to the Yellow Cab Company an instrument which you now call a covenant not to sue? I ask that the so-called covenant or copy of it be embodied in the record.

"MR. O'BRIEN: It has no place in the record. That is held in Devaney v. Otis, 251 Supreme.

"THE COURT: The court is unable to pass on that in this particular case.

"MR. KEHOE: Then may I make this suggestion, your Honor? I offer to show, before your Honor has passed on the motion for a new trial, as to the defendant street car company I offer to show that the defendant Yellow Cab Company as consideration for the action just taken by counsel here, has paid to the plaintiff in this case the sum of $5,000.00, and that plaintiff has executed an instrument in writing and delivered the same to them.

"MR. O'BRIEN: Is that your contention, Mr. Kehoe, that any part of that is in settlement of this case, of the judgment?

"MR. KEHOE: Yes.

"MR. O'BRIEN: And as attorney for Yellow Cab Company, that is your contention?

" MR. KEHOE: No, I am acting for the Chicago Railways Company.

"THE COURT: Let's proceed, gentlemen.

"MR. KEHOE: I am offering to show just what I have indicated here.

"MR. O'BRIEN: We object.

"MR. KEHOE: I offer to show further that counsel has given to the defendant Yellow Cab Company an instrument in writing signed by his client, which he calls a covenant, but it is in satisfaction of the verdict in this case. And I offer to make that proof and when the proof is made I will ask that the court set aside the verdict as to the defendant Street Railway Company and dismiss the cause as to the defendant Street Railway Company on the ground that the action of the plaintiff amounts to a release and satisfaction of the entire cause of action as to both defendants.

"MR. O'BRIEN: All such statements we object to.

"THE COURT: Motion overruled.

"MR. KEHOE: What is the remittitur?

"THE COURT: $2,000.00.

"MR. KEHOE: So that there may be no question, - the court is denying my offer to prove a settlement and satisfaction between plaintiff and Yellow Cab Company.

"THE COURT: Yes.

"MR. KEHOE: I except on behalf of the defendant Street

Railway Company. Your Honor is denying my motion to set aside the verdict and to dismiss as to the street car company?

"THE COURT: Yes.

"MR. KEHOE: To which I except."

From the foregoing it appears that sometime between June 28, 1924, when, after hearing arguments on the motion for a new trial, the court had intimated he would overrule the motion for a new trial upon plaintiff entering a remittitur of $9,000 from the verdict, and July 16, plaintiff had received from the Yellow Cab Company $5,000, and had executed an agreement in writing, the contents of which do not appear, counsel for the defendant asked that the document be embodied in the record. This was objected to by counsel for the plaintiff, and the objection sustained, counsel for plaintiff stating that the document executed was a covenant not to sue, while counsel for the defendant contended that it was a release of the Yellow Cab Company, and therefore the defendant was released also. If counsel for the defendant thought that the document was, in fact, a release and not a covenant not to sue, he should have had it set forth in the bill of exceptions. This not having been done, the defendant is now in no position to contend that it was a release. However, as it is clear from the record that the plaintiff received $5,000 from the Yellow Cab Company, on account of her injuries, that amount should be credited on the $16,000. City of Chicago v. Babcock, 143 Ill. 358; Savage v. C. & J. E. Ry. Co., 238 Ill. 392; Wagner

v. C. & A. R. R. Co., 265 Ill. 345; Vandalia R. R. Co. v. Nordhaus, 161 Ill. App.110; Gore v. Manrotin, 185 Ill. App. 332; O'Neil v. National Oil Co., 331 Mass 30. On that subject we do not consider Devaney v. Otis Elevator Co., 351 Ill. 29, controlling.

If, therefore, plaintiff will remit $5,000 within ten days, the judgment will be affirmed; otherwise, reversed and remanded.

AFFIRMED UPON REMITTITUR.

O'CONNOR, J. CONCURS;

THOMSON, P.J. DISSENTING:

I am unable to concur in the decision of this case. In my opinion the trial court erred in giving instruction 35, at the request of the defendant Yellow Cab Company. By that instruction the court told the jury "that the defendant, The Yellow Cab Company, had a right to operate the taxicab in question on the north bound street car track on Halsted street, and the jury are not to infer that the Yellow Cab Company was negligent, from the mere fact that the taxicab was in the north bound track." This instruction necessarily refers to the time of the collision between the street car and the cab. The question of whether the driver of the taxicab was negligent in being where he was when the street car collided with the cab, was one of the vital questions of fact in this case. It went to the very heart of the defense of the Railways Company, the other defendant. lieved, from the testimony

that of her sister, that the taxicab was driven entirely off the street car track and then was reversed and driven back on to the track, and if they believed that this was done when the street car was so close as to make a collision unavoidable, in the exercise of ordinary care on the part of the motorman; or if the jury believed from other testimony introduced by the plaintiff, that the taxicab came to a standstill and then started up and then stopped again after going only a few feet, and that this occurred when the street car was so close as to make a collision unavoidable, in the exercise of ordinary care, then the jury might properly and reasonably find the Cab Company guilty and the Railways Company not guilty, except for the giving of this instruction, in which the jury are told that they are not to consider that the Cab Company was negligent, merely from the fact that the cab was in the street car track, for the Company had the right to operate its cab in that street car track.

The driver of a motor vehicle may or may not have the right to operate that vehicle in the street car track at a given time, depending on all the surrounding circumstances. The question in such a situation is one for the jury, as to whether, under the circumstances shown by the evidence, the driver of the vehicle properly operated it in the street car track, or whether his doing so amounted to negligence. In my opinion, the giving of the instruction referred to, invaded that province of the jury. This instruction did not refer to any version of the evidence under which it might have been said that the driver of the taxicab

was not negligent in being where he was at the time of the collision, and tell the jury that if they believed from the evidence that such was the situation, then, they were not to infer that the Cab Company was negligent, from the mere fact that the cab was in the street car track. The instruction merely laid the proposition down generally. There can be no question of the fact that on several versions of the evidence, all submitted by the witnesses for the plaintiff, it was a question for the jury whether the act of the cab driver, in having the cab on the north bound track at that time, was an act of negligence. It is doubtless true, as a general proposition, that the driver of a vehicle has the right to operate it over space occupied by a street car track on a public street, but it is equally true that to do so, under some circumstances, amounts to negligence. Whether or not it does, under a given set of facts, is a question for the jury. A similar instruction was given in Pienta v. Chicago City Railway Co., 284 Ill. 348, where the Supreme Court held that the giving of it was error, "in the light of the facts in this record." In my opinion, the error in giving this instruction is not obviated by the fact that the jury found both defendants guilty. But for the giving of this erroneous instruction, the jury may well have found the Cab Company guilty and the Railways Company not guilty.

I am further of the opinion that the trial court erred in denying the motion of counsel for the Railways Company for leave to submit evidence which he contended would show that the plaintiff had been paid $5,000 by the

Yellow Cab Company, and in consideration for that payment, had given the Cab Company a release, the effect of which was to release the Railways Company also. The plaintiff contends that this question is not properly saved for review because the document which she had executed and delivered to the Yellow Cab Company is not in the record and was not even offered in evidence and marked for identification, and no proper offer of evidence was made because a witness was not actually put upon the witness stand and no questions were put to such a witness, for the court to rule upon. It must be remembered that this offer of proof did not occur in the course of the trial of the case, but upon the motion for a new trial. The jury had found both the Railways Company and the Yellow Cab Company guilty, and had assessed the plaintiff's damages at the sum of $35,000. Both defendants had submitted motions for a new trial and the court had heard arguments in support of those motions and had indicated that the motions would be overruled, provided the plaintiff entered a remittitur of $8,000 from the amount of the verdict which the jury had rendered, and the hearing of the motions then went over to another day. When they again came on for hearing the plaintiff remitted $8,000 from the verdict and the Railways Company again urged its motion for a new trial, contending that notwithstanding the remittitur, a new trial should be awarded. At this stage of the proceedings the plaintiff dismissed her suit as to the defendant, Yellow Cab Company. Then the defendant Railways Company submitted a motion for leave to bring in evidence, which, it was contended, would

show that the plaintiff had been paid $5,000 by the Yellow Cab Company and in consideration for that payment, had executed and delivered a release to that company. In order to preserve this point it was not incumbent upon the Railways Company to actually submit its evidence at that time. Evidence is not usually heard in connection with a motion for a new trial. The situation which the Railways Company wished to introduce evidence upon, had only just arisen, and the proper and only proper method, in my opinion, of seeking to get the matter before the court, was to move for leave to bring in this proof. When the court denied the Railways Company leave to submit the evidence suggested, counsel asked that the document which the plaintiff had executed be incorporated in the record. That also was denied. At the time these proceedings took place, counsel for the plaintiff made no contention that the manner in which counsel for the Railways Company made his offer was incompetent or improper, but the contention was that the document in question was "purely a covenant not to sue and has nothing to do with the verdict in any way." That being the case, the plaintiff, is not now in a position to urge that the offer was not properly made, even if such a contention were tenable.

That the plaintiff had received $5,000 from the defendant, Yellow Cab Company, after the jury had returned a joint verdict against both defendants for $35,000, and after the plaintiff had entered a remittitur of $2,000, as required by the trial court, and that in consideration for such payment of $5,000 the plaintiff had given the Cab Com-

pany a document purporting to be either a convenant not to sue or a release, admits of no question. Counsel for the Railways Company offered to prove that it was a release. Counsel for the plaintiff contended that it had nothing to do with the verdict in the case, because it was only a covenant not to sue. I agree with the majority opinion to the extent that if the instrument which theplaintiff had given the Cab Company is to be considered as a covenant not to sue, the Railways Company was entitled to show the fact and to prove the payment given in consideration of the covenant, in reduction of the plaintiff's damages. City of Chicago v. Babcock, 143 Ill. 358. The reference made in the argument of counsel for the plaintiff, to what our Supreme Court said in the case of Devaney v. Otis Elevator Co., 251 Ill. 28, may not be availed of to the contrary. That case did not involve two parties defendant, charged as joint tort feasors, which is the case here. The court did make some remarks in the course of the opinion in that case, about joint tort feasors, and said that in such a case each wrong doer is responsible for the whole amount of the damages and in such a situation there is no such thing as proportioning the damages between the joint wrong doers. Of course, in the case of joint tort feasors, each wrong doer is responsible for the whole amount of damages, but that does not mean that the plaintiff can recover the whole amount of damages from not merely each but from every wrong doer. If A. and B. are joint tort feasors and the plaintiff has recovered a judgment of $10,000 against both of them, he cannot collect the entire amount from A. and give him a covenant not to sue

and then proceed to enforce his judgment against B. on the theory that B. was responsible for the whole amount of damages. After the decision of the Supreme Court in the Devaney case, that court decided the case of Wagner v. C. A. R. R. Co., 265 Ill. 345, which is clearly to the effect that money paid to an injured plaintiff, by a third party, in connection with his injuries, must be considered in reduction of the amount of the damages in a suit against another party based on those injuries. To the same effect, see Gore v. Henrotin, 165 Ill. App. 322; Vandalia R. R. Co. v. Nordhaus, 161 Ill. App. 110; Brennan v. Electric Installation Co., 130 Ill. App. 461; O'Neil v. National Oil Co., 231 Mass. 20, and Chamberlin v. Murphy, 41 Va. 110. As the court well put it in the decision last referred to, to hold that an amount which a plaintiff may have received from one alleged joint tort feasor could not be shown in mitigation of damages in an action against another joint tort feasor "would be to permit the plaintiff to recover for this portion of the damages twice." Counsel for the plaintiff, in contending that the Railways Company had no right to show a payment in consideration of a covenant not to sue, in mitigation of damages, has called our attention to the case of Purinton v. Belt R. R. Co., 204 Ill. App. 383. In that case this court pointed out distinctly that the payment of which the defendant there sought to avail itself, in mitigation of damages, was alleged to have been received from a joint tort feasor, but that "the record is barren of any evidence in any way tending to establish that fact."

But on the theory that the document which the plaintiff had given the Yellow Cab Company, in exchange for the payment it had made to her, was, on its face, not a covenant not to sue, but a release, the execution and delivery of it operated to release not only the Cab Company but also the Railways Company, and the latter should have been given an opportunity to submit evidence which it contended showed such to be the case.

But, I am further of the opinion that, under all the circumstances shown in this record, this document, even on the plaintiff's theory, and assuming that it purported to be a covenant not to sue, must, nevertheless, be given the effect of a release operating to release the Railways Company as well as the Cab Company. At the time the plaintiff gave this document to the Cab Company, she had no right of action against that Company for the injuries involved in this case. The period provided by the Statute of Limitations, under which she could begin a new action against the Cab Company for such injuries, had elapsed. She was not in a position to give the Cab Company a document which was really a covenant not to sue it, because the uncontroverted facts show that she had no right of action against the Cab Company, at that time. The only right of action which she ever had against that Company was the subject of the suit she had previously begun against it and that right she had already reduced to a verdict. In my opinion, it is entirely clear that whatever money the Cab Company paid the plaintiff, must have been paid solely in consideration of her agreement to

release it from the effect of that verdict she had received against it, and in consideration of her promise to dismiss her action as against the Cab Company, and thus discharge and release it from any further liability to her, which is just what the plaintiff did, following the receipt of the money from the Cab Company and her delivery to them of the document in question. Therefore, the payment of the money by the Cab Company to the plaintiff was necessarily in settlement and in accord and satisfaction of the existing cause of action which had been merged in the verdict in this case, and, in my opinion, the instrument which she executed and delivered to the Cab Company must be given the effect of a release. Such was the effect given to a similar document by this court in Petroyeanis v. Pirola, 305 Ill. App. 310. There, a plaintiff procured a judgment against two joint tort feasors for the sum of $5,000. One of them prosecuted an appeal to this court and while that appeal was pending, the defendant who had perfected the appeal paid the plaintiff $3,000 in consideration for a covenant not to sue, which the plaintiff executed and delivered. Thereafter, the plaintiff filed a creditor's bill against the other defendant, seeking thereby to recover the remaining $2,000 due under the judgment. A demurrer to the creditor's bill was sustained and the bill dismissed for want of equity. On appeal from that decree to this court, the decree was affirmed. In the course of its opinion this court pointed out that such claim as the complainant in the creditor's bill had against the original defendants,

had been merged in a judgment after which the complainant had accepted $3,000 in consideration of his promise not to prosecute an execution on said judgment as against one of the judgment debtors. The court then proceeded to say: "Clearly the agreement in the bill cannot be regarded as a covenant not to sue, within the meaning of that term as used in agreements which have been held valid by the courts of review of this state. The bill shows that there was in fact, whatever the parties may have seen fit to entitle the agreement, a promise entered into by the complainant, not to prosecute his existing right, as amplified by the judgment, to have execution issued and levied against the property and assets of both defendants. There was not, at the time this instrument was made and entered into, any matter in controversy between the parties thereto; the cause of action had been merged in a judgment, which judgment we think was satisfied by the acceptance by complainant of the sum of $3,000, and (that) the instrument in question must be regarded as a release and payment of the judgment," as against both defendants. The court further said: "It is clear that this was not the intent of the parties, as expressed by the instrument, but notwithstanding this, a covenant not to sue can have no application in a case where the suit has in fact been brought and judgment entered against one of the parties to such agreement."

So, in the case at bar, whatever the plaintiff and the Yellow Cab Company may have seen fit to entitle the agreement between them, it is clear that what the plaintiff

promised, in consideration for the money paid her by the Cab Company, was that she would dismiss the Cab Company out of the case in which it was a defendant with the Railways Company and would forego the right she then had to enter a remittitur of $9,000 and have the motions of both defendants, for a new trial overruled and a judgment entered against both of them for $16,000, which mounts to nothing more than an agreement on her part to release the Cab Company from the effect of the verdict which had been returned against it and the Railways Company.

For the reasons stated, I am of the opinion the judgment of the Superior Court should be reversed.

183 - 30035

HARRY A. BIOSSAT,

Appellant,

v.

FRANCIS M. GUNN and FELIX T. GRAHAM, trading as WEST PULLMAN COUNTRY CLUB,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

239 I.A. 669

Opinion filed Dec. 2, 1935.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On July 23, 1934, Harry A. Biossat, the plaintiff, brought suit in the Municipal Court against the defendants, Francis M. Gunn and Felix T. Graham, trading as West Pullman Country Club for a balance alleged to be due on a promissory note for $1,000.00, signed "West Pullman Country Club by F. M. Gunn, President, F. T. Graham, Secretary." There was a trial before the court without a jury, and a judgment against the plaintiff. This appeal is therefrom.

The evidence showed the following: On October 9, 1909, a certificate for the organization under "An Act concerning corporations," approved April 18, 1872, of the West Pullman Country Club, as a corporation not for pecuniary profit, was filed with the Secretary of State, and on October 29, 1909, there was duly issued a certificate of incorporation. The name of the club was the West Pullman Country Club. The object was to provide entertainment and promote out of door exercises. The management was vested in a board of nine directors. The location was the City of Chicago. It was agreed that the certificate of incorpora-

tion was never filed in the Recorder's office of Cook County. Shortly after the incorporation, some money was borrowed from the State Bank of West Pullman, the amount is not shown, and a note given. On January 5, 1915, a renewal note, the one here in question was executed. It is dated January 5, 1915, is for $1,000, and payable six months after date to the order of the State Bank of West Pullman. The rate of interest is 6%. The signature is as follows: "West Pullman Country Club, by F. M. Gunn, President, F. T. Graham, Secretary." Various payments made between July 14, 1915 and June 8, 1917 appear on the back of the note. The final endorsement shows that there was paid on June 8, 1917, $170.00, leaving a balance due of $500.00. Gunn, one of the defendants, testified that he was president of the West Pullman Country Club in 1915 and 1916, and that he had some business with the State Bank of West Pullman. He further testified that the note in question, the one here sued upon, was given in place of one that was taken up, and that "in the two years that I was president of the Club we did manage to pay off about half of it;" that when he signed the note and delivered it to the Bank, he received a cancelled note for the same amount. Graham, one of the defendants, testified that he was connected with the West Pullman Country Club as Secretary, and that shortly after he was elected, a note of the Club fell due, and as there was no money in the treasury of the Club, the note was renewed with the State Bank of West Pullman; that he signed the note as secretary.

It is contended for the plaintiff that the defendants, Gunn and Graham, are liable personally. We do not think that

they are. Although the certificate of incorporation was not filed with the Recorder in accordance with Sec. 30, Chap. 32 of Cahill's Rev. Stats. of 1925, we think the West Pullman Country Club must be considered as a defacto corporation, at least in so far as to make that Company liable on the note.

A similar situation of fact occurred in the case of Woodland Social Entertainment Assn. v. John E. Anderson, 187 Ill. App. 507. It was there held that there may be a de facto corporation not for pecuniary profit when the certificate of incorporation is not filed for record in the county in which the principal place of business of such corporation or association is located. It is true that the charter or certificate of the West Pullman Country Club was not recorded as provided for, but the corporation had all the other attributes of a corporation de jure and a certain amount of user may be said to have been shown merely by the fact that as a corporation it borrowed the money in question and gave a note therefor in its own corporate name, and from time to time in the course of several years made payments of interest and principal, beginning on July 14, 1915, and ending with the payment on June 8, 1917 of $170.00.

The State Bank of West Pullman, the payee, dealt with the West Pullman Club as a corporation. It accepted the note as a note of the West Pullman Club, that is, as the note of a corporation. The signature to the note is that of the West Pullman Country Club. The fact that on the note itself there physically appear the words, "By F. M. Gunn, President, F. T. Graham, Secretary," does not import in

any way personal obligations on the part of Gunn and Graham. Their names as they appear are legally only part of the name of the West Pullman Country Club, and the payee must be considered as cognizant of that fact. There is no statute that makes them liable, and at common law, the whole signature, their names included, must be considered merely as that for which it was intended and understood, that is that of the West Pullman Country Club; and not in any way that of Gunn or Graham, Decorski v. Grabarski, 181 Ill. App. 378.

Being of the opinion, therefore, that the defendants, Gunn and Graham, are not liable personally on the note in question, it follows that the judgment of the trial judge must be sustained.

The judgment, therefore, will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

4650a

199 - 30052

JOHN F. WATERS,
Appellee,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, (a New York corporation),
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 669

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit on an insurance policy issued by the defendant society on the life of plaintiff's wife for his benefit. The trial was without a jury, and judgment was entered on the court's findings against defendant for $3,180.46. Defendant appeals.

The controlling question is whether defendant waived its right to declare a forfeiture of the policy.

The premiums were payable in installments of $69.54 on August 11th and February 11th of each year, the policy allowing grace of 31 days subject to an interest charge. For the premium of February 11, 1922, plaintiff mailed his check, dated March 11, 1922, which defendant received and deposited for collection March 13th, and on March 17th returned by letter to appellant calling attention to the endorsement thereon by the bank "not sufficient funds." The letter demanded return of the receipt given for the check and notified the insured that the policy was forfeited for non-payment of the premium, and added: "We trust you will take immediate steps to put this policy in force by signing the enclosed statement of health and returning to this office together with a remittance of $69.54 in good funds."

630.V. 656

The "statement of health" so enclosed was in the form of an application for reinstatement of the policy upon certification of the applicant's good health, not to take effect, however, until all premiums in arrears, with interest, were paid.

On March 27th plaintiff returned the check to defendant certified to by the bank, with a written statement by him that the bank was in error as to the balance. The next day defendant sent the insured a letter acknowledging its receipt and again enclosing a form of a "statement of health" saying it would be necessary for her to sign it in order to reinstate the policy, and that defendant would hold the remittance "in suspense awaiting signed statement of health." The check was cashed and entered in defendant's "suspense account." Plaintiff was also told by defendant's cashier who signed said letters to get a statement from the bank to the effect that the bank made the error in his account and the matter would be submitted to the home office for attention. No such statement was ever furnished.

The matter remained in this shape without further communication until June 7, 1922, when defendant sent another letter to the insured saying its check for $69.54 was enclosed because she had not furnished the necessary requirements for "complete restoration," and adding that by filling out "the enclosed form" and returning the check the policy could be reinstated. This check was returned without filling out the form, and after it had passed back and forth between the parties it finally remained in defendant's possession.

On August 11, 1922, plaintiff tendered the premium that would have been due on that date if the policy was in force, which was refused, and the insured died in the following January before another premium would fall due.

Under these circumstances it is urged by appellant that there was no waiver of the right to forfeit for non-payment of the premium due February 11, 1928, and the great weight of authority sustains that contention upon similar states of facts, holding that where payment of an overdue premium is received and accepted upon a condition of furnishing a health certificate such conditional acceptance does not constitute a waiver of forfeiture. In a very similar case (Gould against this same defendant, 231 N. Y. 308) the payment of the premium was made after the expiration of the time for its payment as extended and defendant cashed the check therefor, stating that before it would consider the restoration of the policy it would require a certificate of continued good health, and sent a form to the insured to be filled out. The court held that the cashing of the check and retention of the proceeds under such circumstances did not preclude defendant from insisting upon compliance with the terms of the policy requiring the production of such a certificate, and that the keeping of the money was in anticipation of the receipt of the certificate and did not constitute a waiver.

On a very similar state of facts in Nelson v. Mutual Life Ins. Co., 190 Pac. 927, (58 Mont. 153) it was said that the sending of letters by the company requiring a health certificate before restoring the policy, although the check was retained, negatived a waiver of forfeiture. In Clifton v. Mutual Life Ins. Co., 108 N. C. 499, the court said the court had a right under similar circumstances to receive and hold the premium awaiting the return of a health certificate demanded as provided for in the policy. The doctrine that conditional acceptance of an overdue premium does not constitute a waiver of the conditions of the policy is too well established, we think, to be controverted. See also New York Life Ins. Co. v. Scott, 23 Tex. Civ. Appeals, 541; Crook v. New York Life Ins. Co., 112 Md. 268; Bank of Commerce v. New York Life Ins. Co., 125 Ga. 582; Mutual

Res. Fund Life Assn. v. Fuchsfeld, 189 Fed. 833.

The policy in the present case expressly provided for its reinstatement if it lapsed in consequence of non-payment of any premium when due "upon production of evidence of insurability satisfactory to the society and payment of all overdue premiums." The payment of the premium was only one condition and defendant had the right to insist upon the other. Its insistence was evidenced by the said letters of March 13, March 26 and June 27, 1928. There was proof of no act tending to show that it waived the production of the health certificate it demanded in these letters. The mere failure to make any further demand between the last two letters cannot be construed as a waiver. The premium was retained much longer in some of the cases above cited where the court held that there was no waiver of the previous demands for a health certificate required as a condition of the reinstatement.

But in our opinion the crucial fact in the case is whether plaintiff's check was good when it was first presented. In other words, whether the bank made a mistake in making such endorsement thereon. The proof with regard thereto is very obscure. It leaves the fact open for inference only. If the certification be regarded as speaking from the date of the check then the inference would be in plaintiff's favor. But if the failure to comply with defendant's request to supply a statement from the bank upon the subject tends to negative such an inference, especially when taken in consideration with failure to comply with defendant's other demands, then the proof on that subject must be deemed very unsatisfactory. It is apparent from the record that the society would have regarded a certificate of health unnecessary if as a matter of fact the check was good when first presented and returned by mistake of the bank. The crucial fact, however, is whether there was such a mistake. In view of the unsatisfactory proof upon that subject we deem it best to reverse

the judgment and remand the cause for a new trial so that that fact, which is capable of definite ascertainment, may be made certain.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concurs.

4651a

266 - 30119

J. CLAUSEN,
Appellee,

vs.

WESTERN ELECTRIC CO.,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 670

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $3,000 for the plaintiff in a personal injury case. His injuries resulted from a collision with defendant's truck at the northwest corner of the intersection of Cicero avenue and Roscoe street, Chicago, the former a car line street running north and south, the latter running east and west. He claimed as a result therefrom an ankylosed condition of the foot, an injury to the tarsal bones and a separation of certain other bones.

Plaintiff left the west curb near said corner to take a southbound street car which after coming to a stop started up almost instantly without letting passengers off or on. Failing to get the car he turned around towards the south and west and after taking a step or two collided with the side of defendant's truck coming from the north. He claimed that as he left the curb for the car he looked north and did not see the truck. But as under all the physical circumstances described the car must have been in plain sight and seen by him if he really looked, and as instead of looking north when he turned to go back to the curb he turned with his back to the direction from which there might be danger from street traffic, appellant urges that the undisputed competent evidence shows contributory negligence as a matter of law and, there-

239 I.A. 670

fore, its motion for a directed verdict should have been granted. But as to that point it is sufficient to say without detailing the evidence that there was some evidence which required its presentation to the jury.

Nor need we discuss the disputed questions of negligence or contributory negligence or the weight of the evidence in view of rulings which we think require a reversal of the judgment.

Plaintiff called two physicians to testify to the injuries, one from his personal knowledge of them acquired from attendance upon plaintiff shortly after the accident, and the other as an expert who examined him a week before the trial for the purpose of testifying thereat and took X-ray films of plaintiff's foot and ankle.

Rulings alleged as erroneous were in admitting the films in evidence without laying a proper foundation for their introduction, and in refusing defendant's motion to strike an answer given by the expert physician to a hypothetical question.

Tested by the rule laid down in Stevens v. I. C. R. R. Co., 306 Ill. 376, with respect to the necessity of establishing the correctness and accuracy of an X-ray skiagraph before admitting the film in evidence we think the first point is well taken. In the instant case the film was admitted upon the evidence given by said expert witness as to his ability to read skiagraphs, and the experience he had in taking them, and that he was present when the X-rays were taken. After an objection made that no proper foundation had been laid for admitting them was overruled, the films were admitted in evidence and said witness was permitted to testify what they showed.

On cross examination he stated that the machine used in taking the films was operated by a girl attendant while he placed the position of the feet underneath it but gave no description of the position in which it was placed. While he also said "we used a fluoroscope to see what condition we found and then

we X-rayed it," he did not say that he looked through it to see what it disclosed, nor did anyone else testify to the fact. Nor did he or anyone else testify as to the correctness and accuracy of the film or of the machine. Discussing the necessity of laying a proper foundation for the admission of such exhibits, the court said in the Stevens case:

> "It must be established by competent evidence that the picture correctly portrays the condition it purports to represent before it has any place in the case. Some witness must be able to testify that the picture offered in evidence shows accurately what the witness saw when he looked into the body with the fluoroscope, or he must be able to say that he is skilled in the use of the X-ray machine and in taking and developing X-ray pictures, and that he took the picture offered in evidence with the body in a certain position, (describing it,) with a machine that he knew to be in good working condition and accurate, and that from his experience he was able to say that the picture produced by the machine was an accurate picture of the internal condition of the body. These methods of establishing the accuracy of the picture are not exclusive, but whatever method is used, its accuracy must be established before it is admitted."

In the instant case while said witness gave testimony tending to show his skill in these matters there was no attempt to comply with any of the other requirements pointed out in said decision to show the correctness and accuracy of the film, nor proof of any other method of establishing its accuracy.

In view of the use made of the films at the trial to show the degree of plaintiff's injuries, which as so shown and explained from the picture by said witness were much greater than those outlined by the attending physician and might thus account for what appellant claims were excessive damages, we think the error in admitting the films upon such evidence alone was a reversible one.

As to the point raised in not striking out the witness' answer to a hypothetical question it appears that on cross examination when asked if his opinion was based solely on the facts stated in the hypothetical question disconnected from any

~~XXXXXXXX~~ observation he personally made the witness answered, "I would not say so." Defendant's counsel then moved to have the answer to the hypothetical question stricken out. The court without making a ruling said, "let us see what he says," and the witness answered: "I also included the condition I found." When the motion was renewed, appellee's counsel intercepted with the remark that the answer might be stricken if it did include any of such matters and then asked the witness whether he included anything found on his examination "that was not included in the hypothetical question." The witness then replied: "No, sir." While the court gave defendant's counsel the right "to ask the question again" he failed to do so or to insist on a ruling by the court as he should have done if he wished to save the point. (West Chi. St. Ry. Co. v. Sullivan, 165 Ill. 302.) Hence the point seems to have been lost.

But we are constrained to remark that the question which called for an apparent modification of the witness' answer was entirely unwarranted and misleading for the original hypothetical question did not contain any facts predicated upon the witness' personal observation or examination. His corrected answer must at least have conveyed to the jury an erroneous impression. But because of the error in admitting the films in evidence the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

278 - 30131

LAURA A. COX,
Appellee,

vs.

NICHOLAS R. FINN et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

239 I.A. 670

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order quashing the proceedings of the Civil Service Commission of the City of Chicago brought before the lower court on a writ of certiorari.

Appellee was in the classified civil service of the City of Chicago as head field nurse at a dispensary connected with the Municipal Tuberculosis Sanitarium of said city. Charges having been prepared against her before the commission, hearings were had, and the commission ordered her discharge upon its finding that she was guilty of the general charges of incompetency and neglect of duty.

Appellants contend that the return to the writ of certiorari shows that the commission had jurisdiction and proceeded legally and justifies such finding, and therefore the court exceeded its authority in quashing the proceedings. Appellee's contention to the contrary is based upon the claim that the return shows that the findings were not based upon the charges preferred and that the evidence does not reasonably tend to support the findings.

It is recognized law, as stated in People v. Linblom, 182 Ill. 241, and Joyce v. City of Chicago, 216 id. 466, that "on a return to a writ bringing the record before the court the only proper inquiry is whether the inferior tribunal had jurisdiction

S 30 C.C.C.

and proceeded legally, - i. e., followed the form of proceedings legally applicable in such cases, * * * ." In the Joyce case, it was said that if the commission had jurisdiction to hear and determine the case the Circuit Court was powerless to review its order of removal, that the proceeding was not a common law or criminal proceeding but an investigation, and while the incumbent of the position had the right to have the charge against him reduced to writing in such form that he could clearly understand the ground assigned for his removal, it was not necessary that the charge should be formulated in technical language similar to that of a declaration or an indictment. (Joyce case, p. 471.)

But it is appellee's main contention that the evidence is not based on the specific charges, and that she had a right to depend upon the specifications as well as the general charges in preparing her case, that they should be taken together, and that the charges are limited by the specifications, especially because it is expressly stated that they are based upon the allegations in the specifications, and because a rule of the civil service commission set forth in appellee's petition says: "Charges shall be filed with the commission and shall state specifically the facts alleged to constitute cause for discharge." In this connection counsel cites the City of Rockford v. Compton, 115 Ill. App. 406, 416, where the court adopts the language of Andrews v. King, 77 Me. 234, 234, that the charges should be "formulated with such reasonable detail and precision as shall inform the people and the incumbent what dereliction is urged against him. The charges should be specifically stated with substantial certainty, though the technical nicety required in indictments, is not necessary." It was held by this court, however, in deciding the Joyce case, 120 Ill. App. 398:

"Even if the specifications appended to the charge had not contained in themselves a substantial cause, the petitioner could take no advantage from that - if on his appearance and full hearing the commission had found him guilty of the general charge, and that general charge had stated a good cause."

In a review of that case by the Supreme Court, 216 Ill. 466, the court said:

"While the plaintiff in error had the right to have the charge preferred against him reduced to writing and in such form that he could clearly understand the ground assigned for his removal, it was not necessary the charge be formulated in technical language similar to that in a declaration or an indictment." (471.)

The Supreme Court also held in that case that it was too late to raise the objection that the charges were not sufficiently specific, it not appearing from the record filed as a return that any objections were made to the written charges.

In view of these rulings, while it may be admitted that the charges as specified are somewhat discursive and indefinite, we think in the absence of any request for more specific charges or of any showing of a want of opportunity to defend against the general charges of incompetency and neglect of duty there is no room for questioning either the jurisdiction of the commission or the legality of its procedure in the instant case.

The court could determine whether there was any evidence in the return tending to support the charges and findings, but could not pass upon its weight. (People v. City of Chicago, 234 Ill. 416; People v. Lindblom, 182 Ill. 241.) If the latter question were open for review much of the evidence heard, and to some extent at least acted upon, would be subject to criticism, being hearsay or conclusions or opinions rather than evidence of facts, or testimony relating to racial, religious or social matters which seemingly had no place in the case and the hearing of which should have been discountenanced.

But while appellee contends such testimony influenced

the findings of the commission, there was also evidence tending to establish the general charges by proof of insubordination and her habitual use of profane and vulgar language unbecoming one while engaged in a public service, and that her insubordination and general attitude toward her superiors were such as to disturb the morale of the institution with which she was connected.

But we need not discuss whether the evidence should tend to support the special charges in a case where it tends to support the general charges and the petitioner is present with counsel and apparently has every opportunity to defend herself against them if, as here contended, the petitioner was guilty of laches in suing out the writ. The order of discharge was entered and went into effect February 9, 1923. The writ was not sued out until February 27, 1924, over a year later. No excuse is set forth for such delay except the commissioners had under advisement her petition for a rehearing filed within 30 days of the discharge and not denied until February 7, 1924. Even if the rules of the commission authorize a rehearing, as alleged in the petition for the writ, petitioner was not precluded thereby from suing out the writ immediately after her discharge or at least after waiting a reasonable time for action thereon. But she waited over a year after her discharge, during which time the position may have been filled and the salary paid to another. Such a consideration was deemed pertinent in determining whether a writ of error was prosecuted with diligence in People v. Burdette, 285 Ill. 48, where the petitioner was held guilty of laches in not filing his petition within six months after his discharge. We do not think this case can be distinguished in its material facts bearing on the question of diligence from those in that case, and, therefore, for the reasons there stated the court below should either not have issued the writ or should have quashed it. Accordingly the judgment will be reversed,

the writ quashed, and the petition dismissed.

REVERSED.

Gridley and Fitch, JJ., concur.

309 - 30162

4653a

MAX KERN,
Appellee,

vs.

CHARLES W. ARNDT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

239 I.A. 670

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover commissions in a real estate transaction upon an alleged oral agreement with appellant Charles Arndt and his wife Sophie. The jury returned a verdict against both defendants and assessed plaintiff's damages at $525.

It was urged on the motion for a new trial that the judgment was insufficient to sustain a verdict against both or either of the defendants. The court held the point was well taken as to Mrs. Arndt and dismissed the case as to her and overruled the motion as to Charles Arndt and entered judgment against him for the amount of the verdict. His attorney also moved in arrest of judgment on the ground that the statement of claim did not state a cause of action. Error in denying these motions is assigned.

It is urged that as the statement of claim alleged a joint liability and there was no evidence thereof a judgment against one of the defendants cannot stand without an amendment to the statement of claim even though the other defendant was dismissed out of the case as aforesaid; and furthermore that it was error to dismiss her out of the case on the court's own motion. As to the latter contention it is sufficient to say that the order of dismissal appears in the transcript of the record to have been

made on plaintiff's own motion, and there is nothing in the bill of exceptions that shows to the contrary.

While it may be conceded that in the usual course of practice the statement of claim should have been amended so that its allegations would conform to the proof of liability against Charles Arndt only, yet it was held in Mayer v. Brensinger, 180 Ill. 110, 113, that where the proof showed that only one of two defendants charged with joint liability was liable and one was dismissed without amending the declaration, a matter of variance was presented which should have been raised in the lower court by a motion to exclude the evidence on that ground so as to enable plaintiff to amend his pleadings to conform to the evidence. Attention was also called in that case to the exceptions of the common law rule respecting a discontinuance as to the entire action from the dismissal or discontinuance as to one of several defendants in an action ex contractu where the cause of action was not established against all of them. One of these exceptions is where one joined as a defendant in the action is an unnecessary or improper party. That was a suit brought against Solomon Mayer and his son Simon, claiming a joint liability for money deposited by the plaintiff with them in certain safety deposit vaults of which they were the keepers and managers. The court held that inasmuch as the proof showed that the son was a mere clerk without interest in the business he was an unnecessary and improper party and therefore the case fell within said exception to the rule. In that respect the case is not unlike this. Here there is no evidence that Sophie Arndt was a party to the contract relied upon. It tends to show a contract with Charles Arndt only and that she was merely present when some of its terms were claimed to have been agreed upon. She was, therefore, an unnecessary and improper party and properly dismissed out of the case; and as under the rule

stated in the Kaier case, supra, the question presented is one of variance and was not properly saved for review, the alleged irregularity of practice in failing to amend the pleadings need not be further considered.

As to the sufficiency of the statement of claim it is enough to say that it was a fourth-class action, the nature of which was evidently understood by defendants, for they filed their affidavit of merits thereto without raising any question as to its sufficiency.

As to the sufficiency of the proof we cannot say that the jury was not justified in believing the testimony of two witnesses against defendant Charles Arndt to the effect that he promised to pay two and one-half per cent commission, such as was assessed against him, and that he also understood that the party with whom he exchanged properties was also to pay plaintiff a like commission. We see no good ground for disturbing the judgment.

AFFIRMED.

Grigsby and Fitch, JJ., concur.

30809

4754

REINCKE-ELLIS COMPANY,
a Corporation,
Appellee,

vs.

LOUIS A. GRAHAM et al.,
Appellants.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK COUNTY.

220 I.A. 670

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order for a temporary injunction granted upon a sworn bill without notice.

The basis of the order is an alleged breach of a contract of employment, the validity of which is questioned on this appeal. By its terms complainant as first party agrees to employ defendant Graham, the second party, from February 20, 1922, at a specified salary, which was afterwards increased as of that date, and Graham agrees to devote his entire time to complainant's business and covenants that if at any time and for any cause the employment ceases he will not thereafter for a space of two years "directly or indirectly, through himself or through others, enter into any business competing in any way with that of first party," and for said period "will not, directly or indirectly, through himself or through others, have any business dealings, coming into competition in any way with the business of first party, with parties who have been clients or customers of first party during the period of the employment of second party by first party."

In case of a breach of these provisions it is agreed that defendant may be enjoined or restrained from violating them and shall pay $1000 as liquidated damages for each act of violation.

The terms of the contract are set out in the bill and

it appears therefrom that complainant is "engaged in the advertising business" and planning advertising campaigns and preparing, producing and distributing advertising matter for its customers and clients; that while in its employ Graham was engaged upon a specified salary in soliciting business from its customers and in the details of the business above described; that each of the other defendants, Low and Wallis, entered into complainant's employ on a yearly salary and performed like duties, and that the salary and compensation of each of the defendants were increased from time to time during their employment, and complainant kept its contract with them. The bill then alleges in substance that they and each of them voluntarily left complainant's employ, Low in August, and Graham and Wallis in September, 1925, and pursuant to a conspiracy between them formed a co-partnership under the firm name of Graham, Low & Wallis, under which they engaged in the same kind of business to compete with and injure that of complainant by soliciting and enticing its then customers to become the customers of said co-partnership; that during their employment Low and Wallis had full knowledge of the terms of the Graham contract and pursuant to said conspiracy have assisted him in violating them; that defendants falsely represented that by reason of their leaving complainant's employ it would no longer be able to conduct properly and efficiently the business of its clients, and upon such representations had already induced one of its customers, which was under a valuable contract with complainant renewable from year to year, to become a customer of their said firm, to complainant's damage of $6,000 a year; that defendants took and carried away and still withhold "numerous papers, correspondence, advertising plans and advertising literature" for use in said competition and for the purpose of inducing customers to cease doing business with complainant and transfer their business to defendants; that they have wrongfully and wilfully made other false statements

and misrepresentations to complainant's customers concerning the method and manner in which complainant conducts its business and concerning the ability of its officers and employes to represent its customers, and have falsely stated that they were dishonest and that complainant is engaged "in dishonest and improper business transactions, practices and policies."

The bill further alleges that while defendants were so employed "the clients and customers of your orator were corporations and persons in various parts of the United States" engaged in the iron and steel industries and that the services rendered for them were "of a special character requiring special and technical knowledge of the business and business methods of your orator's customers and clients," and that complainant owes them a duty and obligation of withholding the same from other competitors engaged in the same line of business.

In accordance with the prayer of the bill and in the language of said covenants not to compete, etc., the injunction temporarily restrains and enjoins Graham individually and as a member of said co-partnership from violating his said covenants not to compete with complainant in any way or in any way deal with any persons who were customers and clients of complainant during the period of Graham's employment, and said Low and Wallis individually and as members of said copartnership from assisting him in violating said covenants.

The contract, while limited as to time, is unlimited as to territory. By its language, therefore, it may embrace the entire continent, and the bill in effect seeks to enforce it over a territory as wide as this country, for it alleges that complainant's customers are in various parts of the United States, and the injunction is broad enough to enjoin defendants' dealing with them.

It was held in Union Strawboard Co. v. Bonfield, 96 Ill. App. 413, that a contract in restraint of trade "unlimited as to territory" was undoubtedly invalid upon its face. Affirming the case in 193 Ill. 430, the Supreme court applied the test whether or not the prohibited area was reasonable so as not to be injurious to the interests of the public and against public policy, saying that it was not sufficient that the restraint be no greater than necessary to secure the intended benefit to the opposite party. The test was again applied in Parr v. Steerman, 264 Ill. 110, where the court said: "Even though a contract be fair and reasonable between the parties, yet if it is so injurious to the public interests that public policy requires that it should not be enforced it will be held void." (Citing Bowle v. Park, 131 U. S. 88; 9 Cyc 533.) Whatever be the test laid down in other jurisdictions, it is the recognized rule in this State that a contract in restraint of trade unlimited as to either time or territory is invalid as against public policy. In addition to the cases above cited we may refer to Lanzit v. Sefton Mfg. Co., 184 Ill. 326, and Victor Chemical Works v. Iliff, 299 Ill. 532. And there is certainly nothing in the ordinary business of advertising either as generally known or as described in the bill which distinguishes it from any other line of business so far as the application of this rule is concerned.

Appellee contends, however, that even though the contract be unlimited as to territory restraint may be imposed within a reasonable area and that it is a matter of defense for defendant to assert that the contract is too broad and invalid. But as said in Victor Chemical Works v. Iliff, 299 Ill. 532, "the burden of proof in such case is upon the complaining party;" and in Atwood v. Lamont, L. R. (1920) 3 K. B. 571, where like covenants were under consideration the court held "it is the covenantee who has to show

that the restrictions sought to be imposed upon the covenantor go no further than is reasonable for the protection of his business." Not only, however, as already stated, does the bill itself allege that the contract extends over the whole United States, at least as to customers in the iron and steel industries, but the bill in effect seeks the enforcement of said contract over an unlimited territory, and the injunction forbids defendants from entering "into any business competing in any way" with that of complainant and in any way having business dealings "with any parties who have been clients or customers" of complainant while defendant Graham was in its employ, and regardless, too, of whether they might have ceased to be complainant's customers before Graham left their employ, and regardless of territory. It is a sufficient answer to this contention, however, to say that complainant's bill does not take any such position as it should if complainant seeks to restrict such competition within a reasonable territory. (Union Strawboard Co. v. Bonfield, 96 Ill. App. 413, 417; Lamsit v. Sefton Mfg. Co., 184 Ill. 326.) As before stated, both the bill and the injunction indicate a contrary purpose. Even if it may be inferred from the bill that it seeks restriction of competition only with customers in the iron and steel industries, yet these industries are so numerous in their various forms and distribute their products over such a vast area in this country that a contract which shuts off "the right to competition in any way with the business" of advertising them in such a wide territory must be deemed prima facie invalid and against competition per se.

Appellee contends that the covenants in the contract are divisible and may be separated, and cites in support of that contention mostly cases of contracts between vendor and vendee involving very different considerations, and cases where the restriction is limited to a certain county or state "or anywhere

else." In the latter class of cases, however, the complainant's bill sought restrictions to a limited territory and alleged facts showing the reasonableness thereof. But here, as was said in Lamkit v. Sefton M'f'g. Co., 184 Ill. 336, it is unnecessary to determine whether the contract may be enforced as to a limited territory, there being no allegations in the bill to sustain such a decree. It was said in Atwood v. Lamont, supra, (p. 594) that where an employer had exacted a covenant from his employe deliberately framed in unreasonably wide terms, the courts would not come to his assistance by applying their ingenuity and knowledge of the law to carve out of the void covenant the maximum of what the employer might have required.

We think it is enough to say that in accordance with the broad language of the contract and the prayer of the bill, which is followed in the temporary injunction, complainant seeks to prevent defendants from "entering into any business competing in any way" with that of complainant, or from dealing with its customers, without any limitation as to territory, not even leaving defendants, as said in the Strawboard Co. case, the liberty to engage in the business even in places where complainant may not choose to do business. As said in the Strawboard case: "Such a contract is void as against public policy."

In view of this conclusion it is unnecessary to discuss appellants' point that in no event should the injunction have been granted without notice, and the further point that the contract being one of employment is distinguishable, so far as the grounds for granting relief are concerned, from contracts between vendor and vendee involving the sale of good will or the use of trade secrets or confidential information in the conduct of the business.

In an opinion of even date in case No. 30386, Northwest Side Lumber Co. v. Layton, we have referred to authorities relating to such a distinction, some of which are more or less applicable to the case at bar. But we deem it unnecessary to elaborate upon these distinctions so far as they may be applicable to this case.

We recognize that it has been said that whether such a covenant is reasonable and binding is a judicial question which must depend in each case upon the particular facts and circumstances. This statement has generally been made with respect to proof thereof either made or required. Generally speaking, where the case is doubtful it is incumbent upon complainant to make proof of such facts and circumstances as show that the restraint sought is reasonably necessary for the protection of his business. (Bowler v. Lovegrove, L. R. (1921) 1 Chanc. Div. 642, 652.) If the bill is not demurrable such proof should have been exacted in this case.

Without, however, attempting to distinguish the various cases brought to our attention we think the contract is prima facie invalid if for no other reason than because it seeks to restrain competition without any limitation as to territory in a business to protect which such restraint does not appear reasonable or necessary.

REVERSED.

Gridley and Fitch, JJ., concur.

4552

171 - 30020

CHARLES P. CAMPBELL,
Plaintiff in Error,

vs.

JAMES A. SILVER,
Defendant in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 671

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In an action for assault and battery, the jury returned a verdict of not guilty. To a declaration alleging the assault, the defendant pleaded not guilty and also non assault demesne, to which a replication de injuria was filed. The evidence is somewhat conflicting, but there is evidence tending to prove that defendant went to plaintiff's office, in Chicago, for the purpose of settling a dispute between them regarding some real estate transactions; that defendant made certain demands upon the plaintiff which plaintiff refused; that defendant called plaintiff a liar, and plaintiff replied that defendant could not say that to him in his office, or that defendant would not repeat that statement outside of the office, or words to that effect, putting on his coat at the same time; that defendant then struck at plaintiff; that plaintiff dodged the blow, and other persons in the office prevented defendant from striking any more blows, but a few moments later, when defendant was released, he rushed at plaintiff and pushed him backward over a radiator, and in the fall plaintiff's little finger was broken and he sustained other injuries. While the defendant testified that he did not strike the plaintiff, he admitted there was a scuffle and that he pushed the plaintiff. From all the testimony, it clearly appears that defendant was the aggressor.

Under these circumstances, the court instructed the jury that the burden of proof was upon the plaintiff "to prove by a preponderance of the evidence the charges made by him, or some one of them; that the burden is not upon the defendant to disprove the charges of the plaintiff, or either of them." There was no other instruction as to the burden of proof, and this instruction was erroneous in a case of this kind. Upon the issue made by the special plea and replication, the burden of proof was not upon the plaintiff but was upon the defendant, and the fact that a plea of not guilty was also filed does not change the situation. (Wells v. Englehart, 112 Ill. App. 217, 220.) It is no answer to this to say, as counsel for defendant does, that if plaintiff desired any instruction covering his theory of the case, the opportunity was his to offer it. The fault of the instruction is that it is misleading under the facts of this case and the issues made by the pleadings.

It was also error to give the eighth instruction, which told the jury that "if the plaintiff by his own conduct purposely brought on the attack and thereby intentionally led the defendant to believe that he was in danger of an assault and battery from plaintiff, the plaintiff cannot recover unless the beating was excessive and not necessary for his self-protection at the time in question." There is no evidence to justify the giving of this instruction. Mere abusive words do not justify an assault. There is no evidence tending to prove that plaintiff's language would have led a reasonably prudent person, situated as the defendant was, to believe that plaintiff was about to assault him, and defendant did not claim that he believed he was in danger of any assault when he began the assault on the plaintiff. Under such circumstances, the instruction was not applicable to the facts proved.

(Reimenschneider v. Mensig, 175 Ill. App. 172.)

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

175 - 30027

4856

THE TRIBUNE COMPANY,
a corporation,
Appellee,

vs.

WOODLAWN DEPARTMENT STORE
BUILDING CORPORATION,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 671

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In this case, defendant's affidavit of merits was stricken from the files on plaintiff's motion, and defendant electing to stand by its affidavit, a judgment was thereupon entered against it for $1105.90 upon the plaintiff's verified statement of claim. Defendant appeals.

The claim of the plaintiff is based upon a written contract for advertising, executed on May 12, 1924, a copy of which is attached to and made a part of the statement of claim. By the first paragraph of the agreement, the "Advertiser" (defendant) agreed to insert in the Chicago Tribune, within twelve months beginning April 13, 1924, 5000 or more lines of display advertising space, subject to the "conditions printed on the back" thereof. By the second paragraph, the "Company" (plaintiff) agreed to furnish the Advertiser with such space under the conditions mentioned. The third, fourth and fifth paragraphs are as follows:

"3. The Advertiser agrees to pay the Company for said advertising space hereinabove contracted for at the 'contract' rate (for such amount of space) specified under schedule of rates printed on the back hereof for local display advertising. Said payments to be made at the Company's office not later than the 15th day of the month following the month in which said space is used.

"4. If the Advertiser shall fail to pay for the use of said advertising space, as hereinbefore provided, the Company

may at its option terminate this agreement.

"5. The rate provided in paragraph 3 hereof, which is to be paid for said advertising space, is the rate fixed by the Company for the use by the Advertiser of the minimum number of lines fixed in paragraph 1 hereof as shown upon the Company's schedule of advertising rates printed upon the back hereof. If the Company should terminate this agreement under the provisions of paragraph 4, or if at the end of said one year period the Advertiser shall not have used said minimum number of lines of advertising space, as fixed in paragraph 1 hereof, the Advertiser hereby agrees upon demand to pay to the Company for said advertising space so used the cost thereof figured at the rate fixed upon the schedule of rates printed on the back hereof, for the quantity of the advertising space so actually used, less the amounts, if any, already paid by the Advertiser to the Company on account of the use of said space. Should the Advertiser use at the end of said twelve months period more than minimum number of lines contracted for in paragraph 1 hereof, the Advertiser shall pay for all said advertising space so used, the cost thereof figured on the basis fixed on the schedule of rates provided on the back hereof, for such number of lines."

The schedule of rates printed on the back of the contract is as follows:

"LOCAL RETAIL SHOPS DISPLAY ADVERTISING

October 15, 1923.

DISPLAY

Gross Rates-	Daily	Sunday
5 or more lines, per agate line . . .	$0.70	$1.00
Contract Rates		
5,000 or more lines, per agate line	$0.55	*$0.80

*Local Retail Shops Advertisements, if specifically ordered for City and Suburbs editions only of the Sunday issue, will be charged at the rate of 60 cents per agate line.

Above 'contract' rate is fixed on express condition that such number of lines will be used within 12 months under the terms of the contract upon reverse side hereof."

The amended statement of claim alleges that in pursuance of said agreement defendant inserted 1200 lines of Sunday display advertising during the month of April, 1924, and paid for the same at the "contract" rate of sixty cents a line, and inserted 610 lines of Sunday display advertising during the month of June, 1924, "and was charged for the same at the rate of sixty cents a line, amounting

to $366;" that defendant also inserted other advertising at sundry other dates given in the statement, as shown by duplicate bills attached thereto, amounting to $26.35; that defendant failed to pay the June bill for $366 on the 15th day of July, 1924, as provided by paragraph 3 of the contract, "and by reason of said failure, and after repeated requests for the payment of said bill had been refused by the defendant, the plaintiff herein, on or about September 9, 1924, cancelled the said contract and so advised the defendant in writing, and in accordance with paragraph 5 of the contract herein the plaintiff charged the defendant the difference between the contract and gross rates," viz: forty cents a line for 1810 lines, amounting to $724.

The affidavit of merits admits all of plaintiff's claim except the item of $724 above mentioned, as to which liability is denied upon the ground "that the provision in the defendant's contract as set forth in the amended statement of claim is a provision for an unreasonable and unlawful penalty and is not liquidated damages." It asserts "that any damage the plaintiff might suffer is readily ascertainable," and, if any, is for interest only. Aside from this denial of liability as to the item of $724, the only allegation of the plaintiff's amended statement of claim which is denied by the affidavit of merits is the allegation that plaintiff cancelled the contract on September 9, 1924, and notified defendant in writing to that effect.

Whether plaintiff notified the defendant that it had cancelled the contract is immaterial. The contract does not provide for any such notice, nor for any notice that plaintiff had exercised or would exercise its option to terminate the contract because of the defendant's failure to pay the June account. The affidavit of merits does not claim that the amount of the June bill was ever in fact paid or tendered prior to the beginning of this

suit, and the commencement of the suit and filing of the plaintiff's statement of claim constituted an election by the plaintiff, as well as notice thereof, to the defendant. It follows that no material issue of fact was tendered by defendant's affidavit of merits, and therefore the sole question involved, both in the trial court and in this court, is whether, upon the facts set forth in the amended statement of claim, the agreement to pay the gross rate is valid and binding as written, or invalid as a stipulation for a nonenforceable penalty.

It would serve no useful purpose to review the decisions of this and other states in which the distinction between penalties and liquidated damages has been considered. In our opinion, no question of that kind is involved in this case. The action is not one to recover either a penalty or liquidated damages, but a suit to collect a balance due on the amount the defendant agreed to pay to the plaintiff for the actual space used by defendant in the plaintiff's newspaper. The contract provides for two sets of prices, one to be paid if the defendant complied with its part of the contract, and the other if it did not. When it failed to pay the June bill at the time stipulated in the contract, as the total number of lines then used was less than 5000 lines, it became bound by the express terms of its agreement to pay the gross rate specified in the contract for the number of lines it had used. The agreed rate for less than 5000 lines was a dollar per line, and as the April and June bills had been rendered to defendant on the basis of sixty cents a line upon the supposition that defendant would comply with its part of the contract, the plaintiff had the right, by the express terms of the contract, to terminate the contract for non-payment of the June bill, thereby also terminating the "contract rate," and to demand and recover the balance due at the "gross rate" per line for the number of lines defendant had actually used up to that time.

The lower rate was not applicable if less than 5000 lines was used. The agreement to use that number of lines was the real consideration for the reduced rate, for it was to apply only upon that express condition. Otherwise, the "gross rate" was to apply. Both rates were therefore contract rates, depending upon the amount of space used. Such an agreement is neither an agreement for a penalty nor for liquidated damages. These views are supported, we think, by the following authorities: Reeves, Admr. v. Stipp, 91 Ill. 609; The Grand v. The Chicago Daily News Co., 92 Ill. App. 129; Star Publishing Co. v. Kneaher, 62 Wash. 215; Missouri Edison Electric Co. v. Steinberg Hat & Fur Co., 94 Mo. App. 543.

The case of Goodyear Co. v. Selz, Schwab & Co., 157 Ill. 186, is relied on by defendant's counsel. The contract in that case was a lease of certain patented machines for sewing shoes, at a rental or royalty of from two to eight cents a pair payable monthly, with a provision that if the rents due on the first of the month were paid on or before the 15th of the month, the lessor would "grant a discount" of fifty per cent, and the court held that it would be unreasonable to hold that the parties intended that the rent should be one amount one day and double that amount the next day. So far as appears from the opinion in that case, there was no agreement to manufacture any specified number of shoes during any specified time, and the reduced rate, or alleged "discount," was not there made upon any consideration of value to the lessor other than merely the prompt payment of the bills. Here the contract states, in terms, that the reduced rate is fixed upon the "express condition" that 5000 or more lines will be used within twelve months. This fact, we think, requires the application of a different rule in this case; for if not, defendant would have the benefit of the reduced rate specified by the contract for the insertion of 5000 lines, without giving plaintiff the consideration

upon which that rate was fixed.

For the foregoing reasons, the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

4872

211 - 30064

ANNE DEEGAN, Admx. of the estate of John P. Deegan, deceased, Appellee, vs. HYDROX COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

239 I.A. 671

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in plaintiff's favor for $10,000 damages for wrongfully causing the death of plaintiff's intestate, a boy nine years old. There have been two trials. In the first trial the verdict and judgment were for $7500. That verdict was reversed and remanded because of an error in refusing leave to file a special plea. Upon this appeal, defendant's main contention is that "not only the manifest weight of the evidence, but all of the evidence, establishes clearly that plaintiff's intestate did not exercise any degree of care at all."

The evidence on the part of the plaintiff tends to prove that plaintiff's intestate was struck and killed by one of defendant's large electric trucks, which at the time of the accident was being driven north at a moderate rate of speed in Wallace street, between 37th and 38th streets, Chicago. The time was between three and four o'clock in the afternoon, when two schools in the neighborhood had just been dismissed, and the school children were returning home along and across Wallace street. The driver's seat on the truck was enclosed in a cab located directly over the front wheels. Behind the cab the body of the truck resembled two large boxes, higher and wider than the cab, and from the floor of the truck on the left side between the front and rear wheels, an iron step was suspended. The evidence for the plaintiff

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tends to prove that as the truck crossed 38th street, a school boy named West jumped on the tail gate of the truck; that the driver ordered him off, but West did not obey, whereupon the driver shut off the power of the truck, and, without waiting for it to stop, jumped off the east (right hand) side and gave chase to the boy, who ran down the street a short distance and disappeared between two houses; that the driver then came back but before he reached the truck (which in the meantime was "coasting" slowly along Wallace street to the north) the plaintiff's intestate, also returning from school with his books in his arm, attempted to cross the street ahead of the truck and was hit and run over by it, and that the truck, without its driver, continued along the street over a hundred feet until it ran into the curbstone near the corner of 37th street. The evidence also tends to prove that there were no other vehicles upon the street at the time of the accident.

Defendant insists that under this evidence plaintiff's intestate was guilty of contributory negligence as a matter of law. One of plaintiff's witnesses, who was crossing 37th street on Wallace street, testified that her attention was attracted by seeing the driver run after the West boy and seeing the driverless truck moving north in Wallace street. She said she stood on the corner and "watched the chase," and saw plaintiff's intestate look both ways before he started across the street; and while she did not testify that he, also, was watching the driver chase the West boy, the jury might easily infer from all the evidence that such was the fact. This witness was corroborated as to the chase of the West boy, by West himself and another boy.

If plaintiff's intestate had been an adult, perhaps it might be held, under such circumstances, that he was guilty of contributory negligence as a matter of law. But a child nine years of age, just released from school, is not held to the same degree of

care as an adult. Courts, as well as juries, take notice of the fact that children who have "just been freed from the restraints of the school room * * * are then more apt to run and play in heedless glee than under ordinary circumstances, and that while so doing they will pay less attention to their immediate surroundings, and exercise less discretion, than they commonly do." (Hackett v. Chicago City Ry. Co., 235 Ill. 116, 130.) Moreover, the sight of an ice cream truck in a public street, with its driver chasing a school boy who was trying to steal a ride on it, was one that might easily divert the attention of another nine years old school boy and excuse in one of his age an act which might perhaps be negligence if committed by an adult. Under such circumstances, the question whether the Deegan boy exercised such care and caution as boys of his age, capacity, intelligence and experience may be reasonably expected to use under like circumstances, was, in our opinion, a question of fact for the jury to determine, - a question upon which reasonable men may reasonably differ.

In East St. Louis Electric Street Ry. Co. v. Burns, 77 Ill. App. 529, the deceased, a boy between eight and nine years of age, during a recess of school, was playing tag in the school yard. From the yard he ran into the street and was struck by an electric street car passing by. It was held that an instruction that the boy was guilty of contributory negligence under such circumstances was erroneous, for the reason that it was the special province of the jury under such circumstances to determine that question, and that the jury had a right to take into consideration their own experience as to what could reasonably be expected from a boy of that age under such circumstances.

In Hagerstrom v. West Chicago Street R. R. Co., 67 Ill.

App. 63, a boy twelve years old returning from school jumped on the back of a street car, and while hanging on the conductor threatened him, whereupon he jumped off and was hurt by another car passing by on an adjoining track. It was there held that the plaintiff was not guilty of negligence as a matter of law, but it was for the jury to say whether under the circumstances he was exercising such care as could be reasonably expected of a boy of his age, intelligence and experience.

In the recent case of Maskaliunas v. C. & W. I. R. R. Co., 318 Ill. 148, a boy seven years and ten months old, in attempting to climb up the side of a moving freight train, fell under it and his leg was crushed. The negligence charged was the failure of the railroad company to comply with the fencing ordinance of the city of Chicago. It was there contended that plaintiff was guilty of contributory negligence as a matter of law, but the court held the contrary, saying: "The law is clearly established by great weight of authority, that between the ages of seven and fourteen the question of culpability of the child is an open question of fact and must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child," citing many authorities to that effect.

We are of the opinion the court did not err in denying defendant's motion to direct a verdict in its favor at the close of the plaintiff's evidence.

When defendant's driver took the witness stand, he flatly denied there was any boy on the back of his truck and denied that he left his truck at any time to chase such a boy. He testified that he saw the plaintiff's intestate standing on the west sidewalk of Wallace street in the middle of the block between 37th and 38th streets just before the accident and saw him "start to run down the street with his hands up like he was going to

catch on," at which time his truck was moving north at about six or seven miles an hour; that when he saw the boy running towards the truck, he shut off the power "to watch him," and thereafter the truck was "just coasting along;" that soon after, he "felt a bump" and got off the truck and went back and saw the boy lying on the street behind the truck; and that from his position in the cab he could see that neither of the front wheels struck the boy.

This testimony of the driver is wholly unsupported, and is contradicted by three apparently disinterested witnesses; but upon the strength of it, defendant's counsel requested an instruction stating that if the jury believe from the evidence "that John Deegan just prior to the time that he received the injuries complained of, was engaged in catching a ride on the side of defendant's ice cream truck without the consent of the defendant, and that while so doing he fell under the rear wheel of the defendant's truck and was injured thereby, then and in such event the defendant would not be liable for the injuries complained of, and your verdict should be not guilty." The court refused this instruction, and defendant claims such refusal was error. The instruction assumes that if John Deegan was injured while catching a ride on the side of defendant's truck, then, regardless of all other facts and circumstances in evidence, he was necessarily, and as a matter of law, guilty of contributory negligence. The instruction does not permit the jury to exercise its own judgment as to whether such conduct was, in fact, contributory negligence, under all the facts shown, but, in effect, directs a verdict for the defendant if the jury believed the driver's story and the driver's inference that John Deegan acted "like he was going to catch on." The instruction could only be a good instruction if it could be held as a matter of law that boys of the age, intelligence, capacity and experience of John Deegan at the time of the accident would not reasonably be expected to be

"engaged in catching a ride" on a slowly moving ice cream truck in a public street, under any circumstances. We know of no authority to that effect. The instruction omits any requirement that the jury must find from the evidence, that the hypothetically stated conduct of John Deegan was negligent, or such as would not be reasonably expected, under like circumstances, from a boy of his age, capacity, intelligence and experience. It assumes that must be true. Moreover, there were other instructions which properly stated and fully covered the general subject of contributory negligence as applied to the facts of this case. We are of the opinion that it was not reversible error to refuse the instruction.

It is further claimed that the verdict is manifestly contrary to the weight of the evidence. The argument of defendant on this point is based upon the assumption that the driver is telling the truth, and that the other witnesses are not. We have carefully examined the evidence in the record, and think we would not be warranted in disturbing the verdict, especially after two juries have found the same way.

It is finally claimed that the court erred in refusing to strike out a statement of the witness Mrs. O'Leary. The statement was made in reply to questions of defendant's counsel as to how the witness "knew this was an ice-cream truck," and how she knew it "was a Hydrox truck." The photograph of the truck which is in the record shows that the words "Hydrox Ice Cream" were printed in huge letters on the side of the truck, and the witness said she knew it was a Hydrox truck "from seeing these trucks," which passed her house "every day." There was no error in the ruling.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Barnes, P. J., dissents.
Gridley, J., concurs.

MR. PRESIDING JUSTICE BARNES DISSENTING:

I think defendant was deprived of having its theory of the case presented to the jury by refusal to give the instruction discussed in the opinion.

243 - 30096

4858

HARRY W. STANDIDGE,
Appellant,

vs.

CHARLES E. THOMSON et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 671

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The Superior court sustained a demurrer to plaintiff's amended declaration in an action on the case for damages, and, plaintiff electing to stand by his amended declaration, a judgment of nihil capiat and for costs was entered against him. From that judgment, he appeals.

The declaration as amended consists of seven counts. The first two paragraphs in all the counts are alike. They allege that plaintiff, Standidge, "was the appellant in a certain cause * * * in the Appellate court of Illinois, First District," pending in that court on appeal from an interlocutory order entered by the Circuit court of Cook county granting to the City Hall Square Company a preliminary injunction restraining Standidge "from using certain premises in alleged violation of a lease;" that defendants "rendered a written opinion in said cause," in which they "negligently, wrongfully, improperly, wilfully, wantonly, maliciously and corruptly made and set forth in said opinion false statements and false findings as to and on the merits of said cause, without any jurisdiction whatever so to do, and without any legal foundation to base such statements and false findings on, in violation of their said duty and contrary to law, as follows."

Following these prefatory averments each count sets forth what seems to be an abstract of one or more alleged

statements contained in the opinion mentioned, and in two of the counts counter-statements of the plaintiff are made as to certain portions of the bill, which are alleged to have been admitted by the answer in that case, and that defendants failed to mention such facts in their opinion; after which it is further alleged that although plaintiff filed his petition for a rehearing, "and therein pointed out to said defendants" the "wrongs so committed" by them, defendants have "ever since wilfully, wantonly, maliciously and corruptly" refused to remedy the same wherefore plaintiff "has sustained damages in the sum of $100,000," etc.

In none of the counts, nor in all of them taken together, is the opinion rendered by defendants set forth. The declaration does not show, except as above stated, what facts were alleged in the bill, or in the answer, nor what relief was prayed. We may, perhaps, infer from what is stated in the declaration that plaintiff was, or claimed to be, a tenant in possession of the 21st floor of an office building in Chicago, and that a dispute arose between him and the lessor regarding his use of the premises for some sort of dances; that when the lessor objected to such use and ordered the dances stopped, plaintiff filed a bill to restrain him from interfering, to which the lessor filed an answer, and, presumably, also filed a cross-bill seeking to enjoin plaintiff from alleged violations of the lease; that after a hearing, in which oral and documentary testimony was introduced, an interlocutory order was entered enjoining plaintiff from conducting such dances in the leased premises until the further order of the court, from which order he appealed; and that the opinion filed in that case, written by defendants, was adverse to appellant's position in the matter and contained the alleged false statements mentioned in the declaration.

The demurrer of defendants is both general and special:

The special cause alleged is "that, as appears from the said declaration, the defendants are judges of the Appellate court," and that the acts and statements set out in the declaration were done and made by them as such judges in the course of a judicial proceeding pending before them.

Plaintiff contends that the facts so alleged in the demurrer do not appear from the declaration, and that, if true, they are matters of defense, which can only be raised by a plea, and not by a demurrer. This contention overlooks, or ignores, the fact that the declaration alleges that the statements complained of were made by defendants in a written opinion "rendered" by them in a "cause pending" in the Appellate court, that "by setting forth said false statements and findings in said opinion as aforesaid, said defendants * * * published to the people of the world for all time to come that said testimony" (introduced by plaintiff) "is untrue;" and that plaintiff filed a petition for a rehearing in said cause "and therein pointed out to defendants said wrongs so committed," etc., which petition was denied by defendants. Plaintiff does not attempt to explain how it would be possible for defendants to do all these things unless they were judges of the Appellate court. We are not aware that anyone but the judges of the Appellate court render and publish written opinions in causes pending in that court, or hear and deny petitions for rehearing.

It is clear, therefore, that the allegations of the declaration amount to a charge that defendants, as judges of the Appellate court, made "false statements and false findings" of fact in a written opinion filed by them, as such judges, in a proceeding pending before them on appeal from an interlocutory order granting an injunction. This being true, the question presented by the demurrer is whether judges of the Appellate court may be held liable to a litigant for statements made in

an opinion filed in such a cause pending before them, even where it is alleged that such statements were false and were maliciously and corruptly made.

A leading case upon this question is that of Bradley v. Fisher, 13 Wall. 335. In that case, the plaintiff had been the attorney representing the defendant at the trial of John H. Suratt for the murder of Abraham Lincoln, in the Criminal Court of the District of Columbia, and the defendant Fisher was the judge who presided at the trial. The jury disagreed and were discharged. Immediately thereafter, the defendant directed an order to be entered on the records of the court striking the name of the plaintiff from the roll of attorneys practicing in that court. The order recited that on one of the days during the progress of the trial of Suratt, immediately after the court had taken a recess for the day, as the presiding judge was descending from the bench, he was accosted in a rude and insulting manner by the plaintiff, who charged that the judge had offered the plaintiff a series of insults from the bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and assured the plaintiff that he entertained for him no other feelings than those of respect, but that the plaintiff, so far from accepting this explanation or disclaimer, had threatened the judge with personal chastisement. Bradleybrought suit against Fisher to recover damages alleged to have been sustained by him "by reason of the wilful, malicious, oppressive, and tyrannical acts and conduct" of the defendant. One of the counts alleged that the several statements contained in the order were untrue, and that defendant "falsely, fraudulently, corruptly, and maliciously intended thereby to give a color of jurisdiction" to his act in making the order. Another count alleged that the defendant "wilfully, maliciously, corruptly, and unlawfully

fabricated the said order to give color and pretense to his jurisdiction in the premises." To this declaration the defendant filed a plea of not guilty and a special plea alleging that the order complained of was made by him in the lawful exercise of his authority and duty, as a judge of said court, for official misconduct and misbehavior of the plaintiff occurring in the presence of the court. The court held that the act complained of was a judicial act, for which the defendant could not be subjected to responsibility in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. The court said:

> "It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. * * *
>
> "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. * * * If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action. * * * The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to these remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

Many other cases are to be found in which the same

principles, in substance, have been declared. Among these cases are the following: Grove v. Van Duyn, 44 N. J. L. 654; Broom v. Douglass, 175 Ala. 268; Mundy v. McDonald, 216 Mich. 444; Lund v. Hennessey, 67 Ill. App. 233; Jones v. Brown, 54 Ia. 74; Stone v. Graves, 8 Mo. 148; Webb v. Fisher, 109 Tenn. 701; Calhoun v. Little, 106 Ga. 336.

But it is contended by plaintiff that the Appellate court, in the cause mentioned in the declaration, had only a special and statutory jurisdiction under section 123 of the Practice Act, and its judges therefore stand on the same ground, and are subject to the same personal liability for their acts, as judges of courts of limited and inferior jurisdiction. It has been held in this state that the Appellate court is a court of superior jurisdiction in the technical sense of that term, and that its orders and judgments must be held to be supported by the presumptions which ordinarily prevail in support of the judicial acts of courts of that class (Zuckerman v. Hawes, 146 Ill. 89); and it has also been held that "when a superior court exercises a special statutory and extraordinary power it stands upon the same ground, and is governed by the same rules as courts of limited and inferior jurisdiction." (Haywood v. Collins, 60 Ill. 328.) The current of modern authority is to the effect that there is no reasonable basis for the distinction, found in the older cases, between the personal liability of judges of superior courts of general jurisdiction and that of judges of inferior courts of limited jurisdiction. (Calhoun v. Little, supra; Thompson v. Jackson, 93 Ia. 376, 382; Robertson v. Parker, 99 Wis. 652, 658.) But even under the old rule, the only distinction in this respect between courts of superior and inferior jurisdiction, was that in the case of the latter, their jurisdiction must be made to appear. (Lund v. Hennessey, supra.) In the present case, we think it sufficiently appears from the declaration

that in writing the opinion mentioned therein defendants were performing a judicial act which was clearly within the jurisdiction of the Appellate court and a part of their duty as the judges of that court. Section 123 of the Practice Act provides that appeals may be taken to that court from an interlocutory order granting an injunction to the Appellate court, that the force and effect of such interlocutory order and the proceedings in the court below shall not be stayed during the pendency of such appeal, and that the Appellate court may affirm, modify or reverse such interlocutory order and direct such proceedings to be had in the court below as the justice of the case may require. Paragraph 49 of Chapter 37, Revised Statutes, provides that all opinions or decisions of the Appellate court upon the final hearing "of any cause" shall be reduced to writing by the court, "briefly giving therein the reasons for such opinion or decision." In considering an appeal from such an interlocutory order, it is necessary for the Appellate court, and is within its jurisdiction, to consider the evidence presented to the lower court upon the application for the injunction, and it is its duty to determine whether the order for the issuance of the injunction is sustained by the evidence, and to state the reasons for its conclusions in a written opinion to be filed in the case. None of the acts alleged in the declaration are beyond the jurisdiction of the Appellate court, but all of them are within its jurisdiction. The mere fact that it is alleged that some of the statements made in the court's opinion were "as to and on the merits of said cause," does not even tend to show that such statements were made "without any jurisdiction whatever." The latter phrase is the pleader's conclusion, not supported by the facts recited in the declaration, nor admitted by the demurrer.

It follows, we think, that even if it were true that

in hearing and deciding an appeal from an interlocutory order granting an injunction, the Appellate court stands upon the same ground as a court of inferior and limited jurisdiction, the acts and statements of defendants set forth in the declaration, are acts and statements for which no personal liability to plaintiff resulted, and the demurrer was therefore properly sustained.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

373 - 30226

4857a

LA VERGNE HASSMANN,
by Charles H. Hassmann,
her father and best friend,
Appellee,

vs.

YELLOW CAB COMPANY,
a corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

239 I.A. 672

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant seeks to reverse a judgment against it for $9363 for damages for personal injuries, and, as grounds for such reversal, contends that the evidence fails to show any causal connection between the accident and the subsequent condition of the plaintiff, and also that the court erred in admitting in evidence some X-ray films.

The accident happened about five o'clock in the afternoon of June 25, 1921, at the intersection of Bloomingdale road with Humboldt boulevard, Chicago. Humboldt boulevard at this point runs north and south and Bloomingdale road crosses it at right angles. The north half of Bloomingdale road is occupied by a steam railroad running upon an elevated roadbed which is carried over the boulevard upon a concrete viaduct. A row of the supporting columns or arches of the viaduct extends from north to south in the center of the main driveway of the boulevard, which is slightly depressed as it passes under the viaduct. The part of Bloomingdale road used for vehicle traffic is a narrow roadway south of and adjoining the railroad structure upon the same level as the boulevard.

At the time of the accident, plaintiff was ten years and ten months old, in good health and rather stout. She was riding in the rear seat of a seven-passenger touring car driven

by her mother. Seated beside her mother in the front seat was the maid, who was holding a baby. In the rear seat with the plaintiff sat a girl friend. As they drove south along Humboldt boulevard on the west half of the main driveway and passed under the viaduct, one of defendant's taxicabs was approaching the viaduct from the south on the east half of the main driveway.

The evidence of six witnesses, called on behalf of the plaintiff, tends to prove that as the car in which plaintiff was riding, going at a moderate rate of speed, emerged from the south side of the viaduct, defendant's cab, going at a high rate of speed, suddenly and without warning, turned to its left without stopping, and ran into the left side of the automobile in which plaintiff was riding, striking it back of the left front wheel.

On behalf of defendant, the testimony of the cab driver and his sole passenger tends to prove that as the cab reached Bloomingdale road, it stopped a few feet before reaching the concrete columns in the center of the driveway, to permit the automobile in which plaintiff was riding, to pass - the driver having seen it coming; that when his cab stopped, the driver's view to the north was shut off by the concrete columns and he moved the cab forward about two feet, turning to the west as he did so, until he was able to see beyond the columns, where he stopped again; that as the automobile came along under the viaduct it was close to the pillars and he testified that its driver was not looking at the road but seemed to be talking to the maid and child at her right, and apparently failed to see the projecting front of the taxicab until her car hit it.

When the cars collided, plaintiff had her toe under the iron foot rest in the bottom of the car and was attempting to turn it over. She was thrown forward by the collision and fell on the

floor of the car. She testified that when she fell, she "bumped her left ankle on the foot rest;" that some one picked her up and put her in the seat; that she rode home in the car and had supper at home; that her ankle "pained a little," but she did not take off her shoe; that after supper, she and a couple of friends walked to a picture show, four blocks away; that the pain increased to such an extent that about 8:30 she left the show, before it ended, limped home, and went to bed; that her foot was then swollen and red, and the next morning "it was terribly swollen" and was black and blue. She remained all that day on a couch, with hot applications applied to the ankle, and felt sick. The second day a doctor was called, and found a black "bruise wound" on the ankle and a temperature of 103. He directed the hot applications to be continued, but, he testified, the patient grew worse, with "evidence of inflammation and pus gathering," and he then caused her to be removed to a hospital, where an operation was performed. Considerable pus was found about the ankle, which came from the lower end of the tibia. She remained in the hospital, but did not improve. For a month, her temperature continued high and her general condition was not good. Then a specialist was called in, who performed a second operation, in which the limb was cut open and a large part of the tibia was chiseled away. After the second operation, plaintiff slowly improved, and gradually recovered.

The operating surgeons called the condition they found in plaintiff's leg "osteomyelitis," which means inflammation in the central part, or marrow, of the bone. Defendant's counsel insist that the evidence shows that such an inflammation could not have been caused by the accident. We do not so read the evidence. The record shows that upon that question, the doctors who testified did not agree. They did agree that such inflammations are due to the presence of germs, which are everywhere, in and out

of the body, and which are innocuous until a cut or a bruise furnishes a field for their destructive growth. But they were not agreed as to the kind of an injury which would be sufficient to furnish such a field. The surgeon who performed the second operation testified that "injuries that lead to osteomyelitis are bruises where the bone has been violently shaken," and that "this bruising, or, rather, violent shaking of the bone, causes certain changes in the nutrition and, in turn, the presence of certain germs" which produce the inflammatory infection known as osteomyelitis. Another of plaintiff's medical witnesses testified, in effect, in answer to a hypothetical question, that in his opinion an injury such as plaintiff received at the time of the accident was sufficient to produce the subsequent development of osteomyelitis. Other surgeons, called by defendant, expressed a contrary opinion. But as the testimony of the experts on this point is in hopeless conflict, and as the other testimony (as to the previous health of plaintiff) negatives the existence of any possible cause, other than the accident, for the inflammatory condition that developed in plaintiff's leg immediately after it was hurt in the accident, we are unable to say that there is no evidence to support the conclusion of the jury, nor that the verdict is manifestly against the weight of the evidence as to the cause of plaintiff's injury. (See Chicago Union Traction Co. v. May, 221 Ill. 530.)

As to the alleged error in admitting the X-ray films in evidence, we are of the opinion that no reversible error was committed. The X-ray pictures were made at the hospital by a witness who testified that she had had ten years experience there in that kind of work and used a machine which was in good condition at the time; that she had charge of the films at the hospital; that she personally placed the plaintiff in position for the pictures, placed the films underneath her, made the exposures and

developed the films, and as soon as they were dry, wrote upon them, in pencil, the plaintiff's name, the date of the exposures, the doctor's name and a number, from all of which she was able to identify them as the pictures taken by her of the plaintiff on the date she then wrote down. While the witness did not testify, in terms, that the pictures were accurate representations of what they purport to show, that is the effect and meaning of her testimony. In the absence of any fact or circumstance tending to cast any doubt upon their accuracy and authenticity, we think the films were properly admitted in evidence. But if they were not admissible, after such preliminary proof, the error, if any, in admitting them, was harmless, for the reason that the films were only used to show the extent of the injury, and that was fully proved, without contradiction, by other competent and undisputed evidence.

Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

4860

23 - 29616

ERNESTINE SCHUMANN-HEINK,
Appellant,

vs.

ANDREW P. MACKIE et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

239 I.A. 672

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 7, 1921, complainant filed her bill against Andrew P. Mackie, Richard S. Folsom and others, individually and as trustees of the Goodland Company (a Massachusetts Trust) and also as copartners, owners of shares of the common or preferred beneficial shares of the company. Only Mackie and Folsom were served with process and they filed separate answers. On June 23, 1924, the chancellor entered a decree in favor of complainant and against Mackie, individually, for $10,000, and against Mackie and Folsom, as trustees of the Goodland Company, for $10,000, payable only out of trust property, but dismissed complainant's bill for want of equity as to Folsom individually and as to Mackie, Folsom and others as copartners. Complainant appealed from that portion of the decree in favor of Folsom individually and in favor of Mackie, Folsom and others as copartners. Neither Mackie individually, nor Mackie and Folsom as trustees, appealed from the decree.

From the evidence presented to the chancellor in open court the following facts in substance appear: On May 21, 1919, Mackie, Folsom and one Henry H. Lippert (a defendant not served), all residents of Chicago, Illinois, executed and duly acknowledged at Boston, Massachusetts, and deposited with the Massachusetts Trust Co. of Boston, as depositary, a certain declaration of

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trust. The instrument is a lengthy one and some of its provisions will hereinafter be referred to. Its main purpose was to create a Massachusetts Trust, named "Goodland Company," to engage in the business of buying, selling and otherwise dealing in lands in the State of California. It was provided that the "shares of beneficial interest," subject to being increased or reduced, should in the first instance be divided into 10,000 preferred shares of the par value of $100 each and 20,000 common shares of no par value. Prior to the filing of the trust instrument there were in the hands of Mackie notes and checks in the aggregate sum of about $25,000, which had been given by various persons in payment of certain beneficial shares in the company, when formed, and Mackie and one J. B. Ransom (another defendant not served) were possessed of an option from the Natomas Company of California for the sale of 5,000 acres of land situated in that state. In June, 1919, after the filing of the trust instrument, there were issued to Mackie by the then trustees, including Mackie, Folsom and Lippert, 3000 preferred beneficial shares, of the total par value of $300,000, and the 20,000 common beneficial shares of no par value, and Mackie caused the $25,000 (realized from the notes and checks) and said option to be transferred to the company, and, out of the preferred beneficial shares so issued to Mackie, certificates for certain of said shares were issued to the makers of the notes and checks, and Mackie agreed, as the company's future needs required, to turn over to it about $85,000, additional cash, to be realized from the sale of certain of the beneficial shares originally issued to him. With this start, and having opened offices in Chicago and in Sacramento, California, and branch offices in various other states, the company proceeded to engage in its business. Subsequently Mackie, from the sale of certain shares issued to him, realized over $85,000 in funds which he turned over to the company. Its office in Chicago was main-

tained until May, 1921, when the books and records were removed to Sacramento and afterwards to another city in California. Folsom, about the time of the organization of the company, received certificates for 75 preferred beneficial shares, for which he paid in cash $250 and gave his note for $1000 to the company. For a time he acted as its secretary and as its attorney, as well as one of its trustees. He practically severed all connection with the company in March, 1920, when a settlement was had and he returned the 75 shares to it. He sent a letter to the trustees at Chicago, resigning as trustee under said trust instrument, on March 19, 1920, and by a letter, addressed to said Massachusetts Trust Co., at Boston, dated and acknowledged before a notary public at Chicago on April 9, 1920, he resigned as secretary and as trustee. This letter was registered, but was not received by said trust company until April 12, 1920, when the resignations became legally effective. In September, 1919, about three months after the company commenced business, complainant's son, who was a selling agent of the company, prevailed upon complainant to purchase of the company certain land in California. In part payment thereof she executed and delivered to the company her two promissory notes payable to it, one for $7,500 due February 1, 1920, and the other for $7,815, due April 1, 1920. She subsequently became dissatisfied with her purchase and, after negotiations between Chicago representatives of the company and her Chicago attorneys, a certain contract, dated April 9, 1920, was signed in the name of the company by its then president, and attested by the signature of said Folsom as its then secretary, and delivered to and accepted by her. A copy of this contract was attached to her bill of complaint as an exhibit and made a part thereof, and the original was introduced in evidence by her on the hearing.

In the contract it is recited that in September, 1919,

complainant agreed to purchase of the company, "a Massachusetts Trust," certain California land (describing it); that she then delivered to the company, in part payment of the purchase price the two notes mentioned; that she does not now desire to consummate the purchase and has refused to pay the notes; that "the undersigned," the company, is now ready to deliver to her a contract for a deed to the land in the usual form, but does not desire her to consummate the purchase if she does not desire to; that "a dispute has arisen" as to her liability on the two notes - one of which, the one for $7,815 due on April 1, 1920, has been discounted by the company at the Humboldt State Bank of Chicago, and endorsed and transferred to it; that, in "partial adjustment" of the dispute, her prior agreement to purchase the land from the company and her other promissory note for $7,500, have been cancelled and "all liability and obligations thereunder terminated;" and that, regardless of the dispute as to her liability on either of said notes, she has paid to said Humboldt Bank the amount of the note held by it, plus interest and protest fees, or the total sum of $8,075.21, and she has agreed to "forbear from suing" the company for said amount so paid to the bank. It is then stated in the contract that, in consideration of complainant's paying said note to the bank and her agreement of forbearance, "the undersigned," the company, promises and agrees as follows: Complainant shall on or before September 30, 1920, make an inspection of lands for sale by the company under its contract with the Natomas Co., which said lands are in the counties of Sacramento and Sutter, in California, and if after such inspection she shall desire to purchase from the company any of such lands and shall within 5 days after inspection enter into an agreement of purchase, "the undersigned" agrees that the amount heretofore paid by her to the Humboldt Bank on said note, together with interest thereon at 6% from this date, shall be applied upon the purchase price of the lands; that if within 5

days after such inspection complainant shall decide not to purchase any of the lands, then "the undersigned" will pay to her, or to her order, within 90 days after such inspection, at the office of her Chicago attorneys, said sum of $8,075.21, with 6% interest from this date, - it being understood that "the undersigned" shall be under no obligation to pay to complainant, or to her representative in case of her prior death, the said amount until 90 days after such inspection. There are other provisions in the contract not now material. A paragraph of the contract, just above the clause commencing "in witness whereof," etc., and above the said signature "Goodland Company, by Albert G. Hines, president and trustee," is as follows: "This obligation is executed in behalf of the Trustees under the Declaration of Trust made and delivered at Boston, Mass., and deposited with the Massachusetts Trust Company, not individually, but as such trustees to bind the Trust Estate." Affixed to the contract is also the seal of the company, and above the attesting signature of said Folsom, as secretary, are the words "Goodland Company; Organized under Declaration of Trust, dated May 21, 1919, at Boston, Massachusetts."

Among the findings in the decree are findings, sustained by the evidence, that in June or July, 1920, the complainant made an inspection of the lands, as provided in the contract of April 9, 1920; that after such inspection she did not enter into any agreement to purchase from the company any of the lands; that her present bill of complaint was filed after a lapse of more than 90 days after her inspection thereof; that prior to the filing of her bill she frequently demanded "of the officers, agents and trustees of the Goodland Company" payment of the sum of $8,075.21, together with interest, so due her under said contract, but that she has not received the same or any part thereof, and that Byron A. Pearce, one of the trustees and officers of the company, informed her that

the company possessed no funds or property with which to pay the same; that the defendant, Folsom, was the attorney in forming the company and also one of the original trustees; that he subscribed $2,500 to its original fund; that he took no active part in the conduct of its business dealings and affairs, or in the negotiations leading up to the signing of the contract of April 9, 1920; that he did not know that the trust property was "fraudulently inadequate;" and that upon his resignation as secretary and as one of the trustees of the company he severed all business relations with it, surrendered to it all of the beneficial shares held by him, made a settlement in full with the trustees and was discharged by them of all obligations to them or to the company.

In said declaration of trust of May 21, 1919, (a copy of which is attached to complainant's bill and made a part thereof) there are numerous provisions exempting the trustees and the beneficiaries from personal or individual liability. In Section 3 of Article III, it is provided: "Every note, bond, contract * * or undertaking, * * executed or done by the trustees, or any of them, in connection with this trust, shall be conclusively taken to have been executed or done only in their or his capacity of trustee or trustees under this agreement and declaration of trust, and such trustees or trustee shall not be personally liable thereon. Every such note, bond, contract * * or undertaking * * shall recite that the same is executed or made by them, not individually but as trustees under this agreement and declaration of trust, * * . The trustees shall have no power to bind the beneficiaries personally by any act, neglect or default, and all beneficiaries and all persons * * extending credit to, contracting with, or having any claim against the trustees, shall look only to the funds and property of this trust for payment of such contract or claim, * * so that neither the trustees, executive committee, beneficiaries, nor the officers,

representatives, agents and employees of the trustees, present or future, shall be personally liable therefor." In Section 1 of Article V, it is provided: "All the obligations, instruments, liabilities, covenants, and agreements, acts and omissions, of the trustees as trustees shall be enforced against, and shall be satisfied out of, the trust estate only, * * ." In Section 6 of Article VI, it is provided: "This agreement and declaration of trust shall not constitute the parties hereunto, or their respective successors or assigns, or any person who acts hereunder as trustee, or who may be beneficiary hereunder, partners. It is hereby expressly stipulated, declared and agreed that a trust, and not a partnership, is hereby created.

Complainant's bill is based upon the contract of April 9, 1930, above mentioned, which was delivered to her, and which she accepted as a settlement of the then existing dispute between her and the company. In the first paragraph of the contract, as well as in another paragraph, is the statement that the Goodland Company is "a Massachusetts Trust," and in the last paragraph, just above the signature of the company by its president and trustee, Hines, and the attesting signature of its secretary, Folsom, is the statement that "this obligation is executed in behalf of the Trustees under the Declaration of Trust * * not individually, but as such Trustees, to bind the trust estate." The theory of complainant's bill, as to defendant Folsom, is that the parties who organized the company as a Massachusetts Trust never intended to form a bona fide trust, and never did business as such, but that the entire scheme from its inception was a sham and a fraud, and that, while Folsom may not have been a party to the fraud (though it is so claimed), he is nevertheless individually, or as a partner with Mackie and others, liable to complainant under said contract.

After a consideration of the pleadings and the evidence we are of the opinion that the court was fully warranted in dis-

missing the bill as to Folsom, individually and as the claimed partner of Mackie and others. Fraud on his part was not shown, and we think that the chancellor's decision was right as a matter of contract law. Complainant, in accepting the contract, recognized the Goodland Company as a Massachusetts Trust, contracted with it as such, and by the express provisions of that contract it was agreed that only the estate of the company should be bound, and the chancellor's decision is supported, we think, by the following adjudicated cases: Shoe and Leather National Bank v. Dix, 133 Mass. 148, 150; McCarthy v. Parker, 343 Mass. 465, 468; Taylor v. Davis, 110 U. S. 330, 335; Glenn v. Allison, 58 Md. 527, 529; Bradner Smith & Co. v. Williams, 178 Ill. 42[illegible], 424; H. Kramer & Co. v. Cummings, 235 Ill. App. 26, 29. Furthermore, after examining the declaration of trust and the evidence showing the subsequent operations of the trustees in conducting the business of the company, we think it sufficiently appears that it was the bona fide intention of the declarants to form a Massachusetts trust and not a partnership, and that such a trust and not a partnership was formed and operated, though apparently without financial success. (Williams v. Milton, 215 Mass. 1; Frost v. Thompson, 219 Mass. 360, 365; H. Kramer & Co. v. Cummings, supra.)

Complainant's counsel strenuously contend that Folsom and Mackie, and their associate trustees and holders of the beneficial shares, should be held liable as copartners to complainant on the said contract because, even conceding that the Goodland Company was a legal and bona fide Massachusetts Trust, such a trust is illegal in Illinois and against the public policy of this State. We do not think that a discussion or decision of this question is necessary under the facts presented by the present record. Complainant's rights, as it seems to us, are to be determined by the provisions of the contract of April 9, 1920,

then agreed to by her after full consideration of existing facts. It is not charged that there was any fraud in the making of the contract, and, clearly, such a contract is not against the laws or public policy of this State.

For the reasons indicated that portion of the decree of the Circuit Court of June 23, 1924, wherein complainant's bill was dismissed for want of equity as to Folsom individually, and as to Mackie, Folsom and others as copartners, is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

4861

152 - 29998

INTERNATIONAL FOLDING PAPER BOX CO., a corporation,
Defendant in Error,

vs.

COLUMBIA ENVELOPE COMPANY, a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 672

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, commenced in the Municipal court of Chicago and tried before a jury, the court (Judge Daniel P. Trude), at the conclusion of plaintiff's evidence and upon defendant's refusal to introduce any evidence, instructed the jury to find the issues in plaintiff's favor and to assess its damages at $6,303.39, and the jury returned such a verdict. On April 30, 1924, after defendant's motions for a new trial and in arrest of judgment had been overruled, judgment was entered against defendant in said amount, and it was given 60 days in which to file a bill of exceptions. The common law record further discloses that within said 60 days, to-wit, on June 28, 1924, on defendant's motion, an order was entered by Judge McKinley, another judge of the Municipal court, extending the time within which defendant might file its bill of exceptions "60 days from date;" that on January 19, 1925, a further order was entered by the trial judge (Judge Trude) that "the bill of exceptions herein presented be and it is hereby approved and ordered filed nunc pro tunc as of June 28, 1924;" and that on said January 19, 1925, said bill was so filed with the clerk.

On January 26, 1925, defendant sued out of this

appellate court a writ of error to reverse the judgment, filing at the time a certain transcript and later, on February 28, 1925, filing a supplemental transcript, which contained said bill of exceptions. On March 14, 1925, plaintiff filed a motion, together with written suggestions, to strike said bill of exceptions from the record. After counter suggestions had been filed the motion was reserved to the hearing.

At the end of said bill of exceptions are the following certificates or endorsements:

"The above and foregoing Bill of Exceptions, statement of facts, stenographic report and questions of law involved was duly presented for approval and signature of Daniel P. Trude, one of the judges of the Municipal Court of Chicago, the trial judge, but said judge not sitting at this time and being outside of the jurisdiction of the Court, I accordingly mark the same "Presented for Signature."

CHAS. F. McKINLEY
June 28, 1924 Judge of the Municipal Court of Chicago."

"Presented to me in open court this 3rd day of December, A. D. 1924.

DANIEL P. TRUDE
Judge."

"I, Daniel P. Trude, one of the Judges of the Municipal Court * *, hereby certify that between June 21, 1924, and August 4, 1924, both dates inclusive, under the regulations made by the Judges of said Court, I was taking a vacation and was not available for the purpose of considering, approving or signing a bill of exceptions in the above entitled cause.

DANIEL P. TRUDE
Judge of the Municipal Court.

Presented this 16th day of December, A. D. 1924

DANIEL P. TRUDE
Judge."

"FORASMUCH as the foregoing matters and things do not duly appear of record, the defendant, by its attorneys, tenders this, its Bill of Exceptions, and prays that the same may be approved, settled, signed and ordered filed as and for a true and correct statement of facts, stenographic report of evidence offered or received, and the rulings of the Court and questions of law involved on the trial, and the Court so finds said Bill of Exceptions to be, and orders the same accordingly filed, nunc pro tunc as of the 28th day

of June, 1924.

DANIEL F. TRUDE
Judge of the Municipal Court, presiding at
the trial of said cause.

Presented this
January 16th, 1925."

It appears from the foregoing that, within the 60 days' time as originally allowed for the filing of a bill of exceptions by defendant, an order, on its motion, was entered by Judge McKinley (not the trial judge) on June 28, 1924, giving defendant 60 days additional time from said date in which to file the bill, viz, by August 27, 1924; that on the same day Judge McKinley marked the bill as "presented for signature" and stated thereon that the trial judge (Judge Trude) was then "outside of the jurisdiction of the court;" that several months after the time as extended to file the bill had expired the same was thrice presented to the trial judge, viz, on December 3, and December 16, 1924, and on January 16, 1925; that according to one of the certificates of the trial judge he was "taking a vacation," and was "not available," only between June 21, 1924 and August 4, 1924, - the last mentioned date being 23 days before the time as extended to file the bill would expire; and that the trial judge, on January 19, 1925, ordered that the bill be filed, and the same was filed, "nunc pro tunc as of June 28, 1924."

We think that it was proper for Judge McKinley, though not the trial judge, to enter the order of June 28, 1924, on defendant's motion, extending the time within which it might file its bill of exceptions, until August 27, 1924 (Sec. 38, Municipal Court Act.) But there is no showing made that, prior to August 27, 1924, and after August 4, 1924 (when apparently the trial judge had returned from his vacation and was thereafter available for the purpose of considering and approving the bill of exceptions) defendant presented, or attempted to present, the bill to the trial judge. On the contrary it affirmatively appears that the first presentation to him

was made on December 3, 1924, - more than 3 months after the time as extended to file the bill had expired. Furthermore, there is no showing of any disability, such as is mentioned in section 81 of our Practice Act, of the trial judge at any time as would warrant the settling and signing of the bill by any other judge of the court. Under all the facts and circumstances disclosed, and by reason of prior decisions, we feel constrained to hold that the trial judge was not warranted in ordering, on January 19, 1925, the filing of the bill of exceptions in question, nunc pro tunc as of June 26, 1924; that the same is not properly a part of the record and cannot be considered by us; and that plaintiff's motion to strike it therefrom must be allowed. (People v. Rosenwald, 266 Ill. 548; City of East St. Louis v. Vogel, 276 Ill. 490, 494; Thomlinson Riley Co. v. Feinberg & Kahn, 230 Ill. App. 442; Rascal v. Wolfson, 215 Ill. App. 1; Schwartz v. Drinka Chicago City Express Co., 198 Ill. App. 381; Jaggle v. Nagle, 183 Ill. App. 237.)

One of defendant's assignments of error is that the court erred in overruling defendant's motion in arrest of judgment; and counsel contend that the motion should have been granted because plaintiff's statement of claim is not sufficient to support the judgment. We have examined the statement of claim, as well as defendant's affidavit of merits thereto, and, considering the pleadings and the issues formed, are of the opinion that counsel's contention is without merit. Finding no error existing in the common law record and, as none of defendant's other assignments of error rest upon that record, it is ordered that defendant's bill of exceptions be stricken from the record and the judgment of the Municipal court be affirmed.

BILL OF EXCEPTIONS STRICKEN AND JUDGMENT AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

163 - 30014

4862

NLY KRAUSS,
Defendant in Error.

vs.

AMERICAN HOUSE WRECKING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 672

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The common law record in the present cause discloses that on January 5, 1925, the Municipal Court of Chicago overruled defendant's motion to extend the time to file its affidavit of merits to plaintiff's statement of claim, defaulted defendant for want of such affidavit of merits, found from plaintiff's statement of claim that there was due him $4757.71, and entered judgment against defendant in said amount; that four days thereafter, on January 9th, the court overruled defendant's motion (supported by affidavits) to vacate such default and judgment and allowed defendant 60 days in which to file a bill of exceptions; and that within the time allowed such bill of exceptions was filed and approved. This writ of error is sued out to reverse the action of the court in refusing to vacate said default and judgment.

Plaintiff's statement of claim, filed December 4, 1924, discloses that his claim is for a balance due upon a note, dated July 22, 1921, payable to plaintiff's order eighteen months after date (viz, January 22, 1923) and signed "American House Wrecking Company, by H. A. Goldman, Pres." In plaintiff's attached affidavit of claim, in the usual form, it is alleged that the net amount due from defendant on the note is $4757.71. On December 13, 1924, defendant entered its appearance by attorneys and demanded a

jury trial. Its affidavit of merits became due on December 28, 1924. When, on January 5, 1925, defendant's attorney appeared and asked for an extension of time in which to file an affidavit of merits no default had been taken against defendant because of its failure to file such an affidavit by the due date.

The bill of exceptions discloses that, on the hearing of defendant's motion to vacate said default and judgment, three affidavits in its behalf, all dated January 5, 1925, and one counter affidavit in plaintiff's behalf, were presented and read to the court. Defendant's one affidavit on the question of its meritorious defense to plaintiff's claim was that of Robert A. Goldman, president of defendant. He alleged in substance that the note sued upon "represents a series of notes" given by defendant to all its creditors in a certain composition agreement in bankruptcy, approved by the U. S. Court for the Northern District of Illinois; that pursuant to such agreement said series of notes, and the note sued upon, were "duly cancelled" and their cancellation approved by said U. S. Court; that under the terms of said agreement, a creditor's committee was appointed, which had title to all of defendant's assets and had the power and right to liquidate and settle with creditors on any basis it saw fit; that the committee liquidated said assets and "satisfied this plaintiff's claim in full;" that plaintiff, basing his claim on the same note now sued upon, filed an action in said U. S. Court in an endeavor to set aside the composition agreement, but that after trial plaintiff was defeated; that thereafter plaintiff commenced another action in the Municipal Court of Chicago on said note and, after trial, asked for and was granted a non-suit; that thereafter plaintiff commenced a still pending equity proceeding in the Circuit Court of Cook County, based upon said note and praying for a receiver, which prayed was denied; that, under the terms of said composition

agreement, said creditor's committee "made a full and complete settlement of all of the liabilities then existing," and that "the corporation, who executed the note upon which this action is based, is not the corporation that is now in existence and defendant in this action;" that the existing corporation and present defendant "has been purchased for a good and valuable consideration, with due notice to all of the creditors as well as plaintiff, and with the approval of said U. S. District Court, and that said purchase was not subject to the obligations of the corporation which executed the note herein in question;" and that subsequent to said bankruptcy proceedings this defendant entered into certain dealings with plaintiff, by reason whereof plaintiff now owes defendant a sum in excess of $4,000, for which it asks leave to file a statement of set-off.

The affidavits of Frank D. Shobe, an attorney associated with defendant's attorneys, and Jerry McCarthy, an assistant in the office of the clerk of the Municipal Court, relate solely to the question of the diligence of defendant's attorneys. It is alleged in substance in Shobe's affidavit that, after he had entered defendant's appearance in the cause, he, on December 17th or 18th, went to the clerk's office and endeavored to obtain the files of the cause, and particularly plaintiff's statement of claim, but was informed by the clerk in charge that the same could not be found; that thereafter, on four different days between the date of his first call and December 30th, he called at the clerk's office for said files and statement but on each occasion the same, after search, could not be found; that on December 30th he acquainted said McCarthy of his unsuccessful efforts and requested the latter to make a search for the papers; that McCarthy finally found them and affiant then for the first time saw plaintiff's statement of claim, procuring a copy thereof, and then for the first time learned of the date on

which defendant's affidavit of merits was due; that thereafter until January 2, 1925, he was unable to confer with defendant as to its defense for the reason that its president was out of town and unavailable; that on December 30th and thereafter he made many unsuccessful efforts to communicate by telephone with plaintiff's attorney of record, and did not reach him until Saturday, January 3rd, when he explained the circumstances of the missing files and the absence of defendant's president, and requested additional time in which to file its affidavit of merits; that plaintiff's attorney refused to stipulate, but suggested that a written notice be served, etc.; and that within an hour such notice was served on him to appear in court on Monday, January 5th, when defendant's motion for additional time, etc., would be presented, but that on the hearing said motion was denied and the judgment in question entered. McCarthy's affidavit is corroborative of Shobe's affidavit that prior to December 30th the latter made several unsuccessful efforts to procure plaintiff's statement of claim from the files, but that it and said files could not be found. And we do not think that the couter affidavit of Emanuel M. Schwartz, an assistant in the office of plaintiff's attorney, negatives any of the material facts as set forth in Shobe's affidavit.

It has been frequently decided in this State that, on a motion made in apt time to set aside a default and judgment and give defendant the right to plead and have a trial upon the merits, both diligence and merits must appear (Barrett v. Queen City Cycle Co., 179 Ill. 68, 69; Hartford Life Ins. Co. v. Rossiter, 196 Ill. 277, 278); that, although it appears that the defendant has a meritorious defense, the default will not be set aside if he or his attorney has been guilty of negligence (Plaff v. Pacific Express Co., 251 Ill. 243, 247; Kloepher v. Osborne, 177 Ill. App. 384, 392); but that, it appearing that defendant has a meritorious defense, the default

should be set aside, providing a reasonable excuse is shown by defendant why he did not file a plea in proper time. (Mason v. McNamara, 57 Ill. 274, 277; McMurray v. Peabody Coal Co., 281 Ill. 218, 226; Waugh v. Suter, 3 Ill. App. 271, 275.) In the McMurray case, citing the Mason case, it is said: "It has been the long and well established practice in this State for courts to be liberal in setting aside defaults at the term at which they are entered, where it appears that justice will be promoted thereby." In the Waugh case it is said: "In applications to set aside defaults, we regard the point of a meritorious defense as altogether the more important of the two required, and where the judgment is evidently unjust, a certain degree of neglect may, especially as terms can be imposed, be held to be excusable."

In the present case we are of the opinion that the affidavit of said Goldman sets forth facts which tend to show that defendant has a meritorious defense to the note sued upon; that the affidavits of Shobe and McCarthy show a reasonable excuse on the part of defendant's attorneys in not filing a plea in its behalf by the due date, and that said attorneys, while possibly not exercising the highest degree of diligence, cannot be considered as having been guilty of negligence; and that the entire record discloses such a state of facts as suggests that justice will be promoted in allowing defendant to plead and make its defense on the trial. Accordingly, we feel constrained to hold that the trial court abused its discretion in not vacating the default and judgment, giving defendant the opportunity to plead and defend. (McMurray v. Peabody Coal Co., supra.)

The order of the Municipal Court, entered January 9, 1925, refusing defendant's motion to vacate the default judgment against it of January 5, 1925, is reversed, and the cause is remanded with directions that said judgment be vacated and that defendant be given leave to plead and defend on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Fitch, J., concur.

187 - 30039

FRED W. SIMPSON, doing business as Acme Minerals Co.,
Complainant and Appellee,

vs.

GEORGE H. SIMPSON and G. ELDON SIMPSON, individually and GEORGE H. SIMPSON, IDA M. SIMPSON and G. ELDON SIMPSON, copartners doing business as Acme Manufacturing Co.,
Defendants.

G. ELDON SIMPSON,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

239 I.A. 672

STATEMENT BY THE COURT. By this appeal G. Eldon Simpson seeks to reverse an order, entitled in said equity cause and entered December 1, 1924, wherein he was adjudged guilty of contempt for having knowingly and willfully violated a preliminary injunction issued on May 10, 1924, and directed to pay a fine of $250, and that in default of such payment he stand committed to jail "until such fine is paid or he is discharged according to law."

In the same order George H. Simpson, individually and George H. Simpson, Ida M. Simpson and G. Eldon Simpson, copartners doing business as the Acme Manufacturing Co., also were held in contempt, and he and the copartnership were fined $250.

On May 27, 1925, separate writs of error (Nos. 30305 and 30306) to reverse said order were sued out of this appellate court by George H. Simpson, individually, and by the three members of said copartnership, and subsequently these writ of error causes were consolidated for hearing with the present appeal, No. 30039, and all three causes, by stipulation of counsel, have been considered on the record, abstracts and briefs filed in cause No. 30039.

Complainant's verified bill, filed May 6, 1924, prayed

for an injunction, a discovery and an accounting. It appears from its allegations and attached exhibits that in April, 1921, complainant and his brother, George H. Simpson, formed a copartnership, known as Acme Minerals Co., which thereafter was engaged in the manufacture and sale of certain mineral products; that about January 1, 1924, George conveyed his one-half interest therein to his wife, Ida M. Simpson; that about this time its business was conducted in the offices and factories at Forest Park, Illinois, of another copartnership, known as the Acme Manufacturing Co., between George and his son, G. Eldon Simpson, which sold other products to farmers and in which complainant was not financially interested; and that on March 5, 1924, complainant entered into a written contract with Ida and George, wherein complainant purchased the interest in the Minerals Co. copartnership which formerly had belonged to George, and it was agreed that said copartnership should be dissolved on March 8, 1924, and thereafter its business should be conducted solely by complainant. There were various provisions in the contract relative to the future activities of the two businesses, wherein it was sought to prevent unfair trade competition and confusion in the advertising of their products. It is charged in the bill in substance that about January 1, 1924, George entered into a conspiracy with Eldon and others to sell to complainant his one-half interest in the Minerals Co. copartnership and to thereafter ruin its business for the financial benefit of the Manufacturing Co. copartnership, that after said sale the defendants did various unlawful acts (set forth in detail) in partial consummation of said conspiracy, to the great injury of complainant, and that unless they were enjoined from doing further acts he would suffer irreparable damage.

On the day the bill was filed personal notice was served on George and Eldon that an application for a preliminary

injunction would be made, and on May 8, 1924, they entered their appearance by solicitor and filed short answers denying in general terms the allegations of the bill, and, after a hearing at which they were present, the court, on May 10, 1924, and until further order, enjoined each of them individually, their agents, etc., and also George, Eldon and Ida M. Simpson, as copartners, etc., their agents, etc., from

> "1. In any manner making any false statement or statements relative to the financial condition, ability to pay, credit or standing of the complainant;
> 2. Attempting to induce, or inducing the agents, district managers, salesmen and dealers of the complainant, to break their written contracts with the complainant;
> 3. Manufacturing the mineral mixtures, known as 'Acme Mineral Feed,' and also known as 'Complete Mineral Mixtures;'
> 4. Selling or offering for sale said 'Acme Mineral Feed' or said 'Complete Mineral Mixtures;'
> 5. Advertising, manufacturing or selling any mineral food or mixtures which contain the words 'Acme Mineral Feed' or 'Complete Mineral Mixtures' or 'Containing Nine different Mineral Ingredients;'
> 6. Using the mailing lists which have accumulated from time to time, directed to the Acme Mineral Co. or any copy or copies thereof, and from circularizing the parties named in said mailing lists;
> 7. Using the name 'A.M.C. Minerals,' in connection with the word 'Acme,' or any similar initials, or words similar to the names of complainant's products, 'Acme Mineral Feed,' 'Complete Mineral Mixtures,' or 'Containing Nine Different Ingredients;'
> 8. Depositing collections, made on account of moneys due and owing to the Acme Minerals Co. to the account or to the credit of the Acme Manufacturing Co. or to the account or credit of any person or concern than the Acme Minerals Co.
> 9. In any manner attempting to injure, damage or destroy the business of the complainant by making false statements or representations, with reference thereto;
> 10. In any manner unfairly competing with the business of the complainant."

Notice of the injunction was served personally on George and Eldon on May 12, 1924, and shortly thereafter on Ida M. Simpson by registered letter. Subsequently, she filed a short answer to the bill by the same solicitor as represented George and Eldon.

On July 16, 1924, upon notice and leave of court, complainant filed his verified petition against all defendants for a rule to show cause why they should not be punished for con-

tempt, because of four specific violations of the injunction, as alleged in the petition, as follows:

"1. That the defendants on May 15, 1924, caused the following advertisement to be published in the 'Olin Recorder,' Olin, Iowa:

'Notice to Farmers -

Why pay Five to Six Dollars per cwt. for Acme Minerals when we will sell you Acme Minerals in one or two bag lots delivered your station for $3.00 per cwt.?

Address

Farmers Elevator Company,

Oak Park, Illinois.'

That said advertisement in the same language was published on May 15, 1924, in the Greenfield Republican, at Greenfield, Ohio.

That the same advertisement signed 'C. F. Sumner Feed Store,' Maryville, Missouri, was published by the said defendants on June 9th and June 19th and July 10th, 1924, in 'The Times Republican,' at Bedford, Iowa.

2. That on, to wit, May 17, 1924, defendants violated said injunctional order by attempting to induce one John Rowbal, Ord, Nebraska, to break his written contract with complainant, the said John Rowbal being one of the salesmen or dealers of the complainant at said time; as well as various other dealers and salesmen of complainant.

3. That since the issuance of said injunctional order, the said defendants have failed and refused to deposit collections made on account of moneys due and owing the Acme Minerals Co., to the account or credit of the Acme Minerals Co., and have violated said injunctional order by depositing such collections to the account and credit of Ida M. Simpson, or other persons or concerns than the Acme Minerals Co.

4. That said defendants have violated said injunctional order by unfairly competing with the business of the complainant, by placing accounts due the Acme Minerals Co. in the hands of collection agencies and lawyers, without the consent of the complainant, with the intent and malicious purpose to injure and damage complainant's business."

Separate verified answers to the petition were filed by all defendants, in which all of said charges were denied, except that in the answer of George Simpson he admitted, as regards the fourth charge, that since the issuance of the injunction he had placed accounts, owing to the Minerals Co., in the hands of agencies and lawyers for collection, but that this had been done in the usual course of business, and not with any malicious purpose.

A hearing on the rule was had first on August 22, 1924,

during the summer vacation of the courts, at the commencement of which petitioner's solicitor introduced, without objection, a telegram and letter, dated respectively May 20 and May 21, 1924, (several days after notice of the injunction had been given) addressed to Roswell L. Smith of Red Oak, Iowa, and signed "Acme Manufacturing Co." Petitioner's solicitor stated that these writings had been discovered after the filing of the petition, otherwise they would have been set forth therein, and defendants' solicitor stated that there was "no question" as to the fact that said writings had been sent by defendants' copartnership to said Smith, its sales agent and a former agent of the Minerals Co. The letter on its face bore the initials "O. E. S.:H," indicating its dictation by O. Elden Simpson to a stenographer. The telegram stated: "Keep on selling; pay no attention to injunction; letter following." The letter states in the first paragraph: "We received your letter stating that you had received a copy of an injunction from the Acme Minerals Co., and we thereupon wired you to go right along and sell and do business as formerly for the reason that this injunction means nothing, as we will try to explain." The writer, after quoting most of the injunctional order, proceeds to give his reasons why in his opinion the injunction "means nothing," and why said sales agent could continue to act the same as before its issuance. Petitioner also made proof of the publication in the three newspapers of the advertisements on the dates as charged in the first paragraph of the petition. He also introduced certain documentary evidence tending to show a violation of the injunction in the particulars as charged in the third and fourth paragraphs. He also introduced a letter written by the Acme Manufacturing Co., with the initials on its face "O. E. S.:M.P.," dated May 17, 1924, addressed to John Rowbal of Ord, Nebraska, then one of petitioner's selling agents, in which the writer, after referring to certain commissions due him from the

Minerals Co., stated: "George H. Simpson sold his interest in the Acme Minerals Co., and as far as we know Fred W. Simpson is now the sole owner. He has manufactured from the factory and office of the Acme Manufacturing Co., owned by it. As we understand it you are not under contract with the Acme Minerals Co., and we would therefore very much appreciate having you sell the products of the Acme Manufacturing Co. You have sold them heretofore, and you know the splendid satisfaction they give, and you also know that we remit commissions promptly." This letter, together with other oral and documentary evidence, tended to show a violation of the injunction in the particulars charged in paragraph second of the petition, and other evidence tended to show similar violations. During the first hearing the defendants took the position that they desired the fullest investigation as to their acts since the issuance of the injunction, but that a full hearing, during the court vacation, was inconvenient, etc. Defendants had been noticed to produce certain other letters and writings, but did not do so, claiming that they were not in their possession. The court finally said: "I will tell you what I will do. I am going to find that he (referring to G. Elden Simpson) is guilty of contempt of court, and I am going to suspend the action of the sentence until September 15th, and at that time I want a complete account as to what was done by him and his concern with reference to the compliance with this order, all the correspondence and everything else. * * I want everything that was done to stop the publications. * * And a whole lot depends on what he produces at that time. I feel that people have no protection unless the orders of the Court are enforced."

On the following day, August 23, 1924, the court entered a draft order, in which numerous findings of violations of the injunction by G. Elden Simpson, individually, and by said copartnership, were made, and in which it was adjudged (a) that G. Elden

Simpson had "knowingly, willfully and flagrantly violated the injunction" and was in contempt of the court; (b) that the three members of said copartnership had done the same and were in contempt; and (c) that the further hearing of the cause be continued until September 15, 1924."

Several further hearings were had, - the first on October 7, 1924, and the last on November 22, 1924, - during which witnesses were called on behalf of defendants, including George and G. Eldon Simpson, and much documentary evidence was introduced. Further evidence was introduced on behalf of petitioner. No point was made at any of the hearings that said telegram and letter of May 20th and May 21st could not properly be considered by the court, because of the fact that their sending had not been charged in the petition. On the contrary, in his opening statement to the court on October 7th, defendant's solicitor stated that "the crux of the contempt, if any, is in the letter and telegram," and he then proceeded to offer in argument excuses for their sending. Subsequently he stated "I am not standing on any technical grounds at all." And both George and Eldon Simpson subsequently testified that said letter, instead of having been written by Eldon, was in fact written by George, acting on the advice of former counsel (who had withdrawn from the case.) There was evidence introduced tending to show that George and Eldon, in giving this testimony, had committed perjury. As to the first charge contained in the petition (viz, the publication in the newspapers of advertisements after the issuance of the injunction) defendants introduced evidence tending to show that they had made certain endeavors to have such advertisements cancelled, but had failed in their endeavors without their fault. This evidence, however, was unconvincing and did not show bona fide efforts on their part to bring about quickly a discontinuance of the publication of such advertisements as had been enjoined; and the

further evidence introduced by them, in excuse or extenuation of the charges as contained in paragraphs 2, 3 and 4 of the petition, also was unconvincing.

Finally, on December 1, 1924, the order in question was entered, in which the court found in substance (a) that the allegations of complainant's petition of July 15, 1924, are true, and that the verified answers of the defendants and each of them are untrue, and were known to be untrue when made; (b) that defendants, knowing the terms of the injunction and in disregard thereof, violated the same in the particulars mentioned in the four paragraphs of the petition (above set forth); (c) that the telegram and letter of the copartnership, the Manufacturing Co., of May 20th and 21st, 1924, were written by Eldon Simpson, with the knowledge, connivance and consent of George H. Simpson, in contumacious disregard of said injunction; (d) that said defendants, having knowledge of the injunction, violated its terms "by attempting to cause F. J. Bowman, of Black River Falls, Wisconsin, to break his written contract with complainant;" (e) that subsequent to the entry of the order of August 23, 1924, said George H. Simpson, in disregard and in violation of said injunction, "made false statements to one Roswell L. Smith of Red Oak, Iowa, relative to the financial condition, ability to pay, credit and standing of complainant;" (f) that subsequent to the entry of said order of August 23rd, the duly authorized agent of defendants, one Van Horsen, in disregard and in violation of said injunction, "made false statements to one S. L. Wine relative to the financial condition, ability to pay, credit and standing of complainant;" and (g) that subsequent to the entry of said order of August 23rd, the defendants, George and Eldon Simpson, "in an attempt to justify or mitigate the contempt of court theretofore proven against them," gave false testimony in regard to said letter of May 21, 1924 (particulars set forth.)

It is to be noticed that said findings, above mentioned as c, d, e, f, and g, concern matters which were not charged in complainant's petition.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Counsel for G. Hilton Simpson in the present appeal, and for the other defendants in the two writ of error causes consolidated with it, urges three main contentions as grounds for a reversal of the court's order. The substance of the first is, that the several fines imposed upon the defendants are based upon numerous separate findings of the court (last above mentioned), and that said findings, except those numbered (a) and (b), have no basis for their support in that they were not charged in complainant's petition, and thereby defendants have been found guilty of offenses, the character of which they were not advised of and were not given any reasonable opportunity to make a defense thereto. We do not think that there is any merit in the contention. Defendants were given the fullest opportunity to give evidence in defense or in explanation of all matters mentioned in the findings. Counsel in argument frequently refers to the fact that the sending of the telegram and letter of May 20th and May 21st, 1924, are not charged in the petition, and he urges that because of this the order should be reversed. In view of the actions of defendants on the hearings, and the attitude of their counsel representing them, we cannot agree. It is well settled law that in proceedings for contempt committed out of the presence of the court "the charging paper must show on its face facts sufficient to constitute a contempt" (13 Corpus Juris, p. 65, sec. 89); and this for the reason that "the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation". (Cooke v. United States, 45 Sup. Ct. Reporter, adv. Sh. May 1, 1925.) But the petition in the present case shows facts sufficient to constitute a contempt, outside of the contempt clearly appearing from said telegram and letter; and, when, on the first hearing of August 22nd, said writings (discovered after the date of the filing of the

petition) were exhibited and offered in evidence, defendants made no objection to them, and, indeed, admitted their genuineness. By their failure to object to them, upon the ground here urged for the first time, they waived the point. (Franklin Union v. People, 121 Ill. App. 647, 658; O'Brien v. People, 216 Ill. 354, 367; Aaron v. United States, 155 Fed. Rep. 833, 836.) Furthermore, as the hearing, commenced on August 22nd, was continued for the purpose of allowing defendants to introduce evidence in explanation or in mitigation of the charges, including the sending of said writings, and as during the subsequent hearings they were allowed to introduce such evidence as they could along those lines, they had ample opportunity for "defense or explanation" as to sending of the writings. And we think that the writings were proper to be considered by the court, as tending to show the purpose and spirit of the defendants in doing the acts which were specifically charged in the petition. (Rogers Mfg. Co. v. Rogers, 38 Conn. 121, 134.)

The substance of counsel's second contention is, that, inasmuch as the several fines imposed are in the aggregate, and not apportioned to the different findings of the court, and as many of said findings have no charges in the petition to support them, said fines "are nullities," and the order in question must be reversed. Counsel cites Gompers v. Bucks Stove & Range Co., 221 U. S. 418, as sustaining the contention. In that case three defendants were found guilty of contempt in making certain publications prohibited by an injunction, and they were ordered imprisoned in jail for 12, 9 and 6 months respectively. The trial judge, in one decree, had adjudged that each defendant was guilty of nine independent acts set forth in the petition, and had consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance, and because of this, and for other reasons not applicable to the present

case, the U. S. Supreme Court set aside the convictions and remanded the cause, without prejudice to the right of the court, in a proper proceeding, to punish the defendants for any contempt committed against it. Counsel relies on the following language in the opinion on page 440: "We cannot suppose that he [the trial judge] found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that having found them guilty of these nine specific acts he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law and in fact, did not constitute a disobedience of the injunction." And counsel argues, as we understand him, that, because the trial court in imposing the fines of $350 evidently took into consideration the fact of the sending of said telegram and letter of May 30th and May 31st, 1924, not charged in the petition, the holding in the Gompers case is decisive of his contention. We do not think so. While it is true that the order in question, besides finding the defendants guilty of the four violations specifically set forth in the petition, also finds them guilty of other contemptuous acts not charged in the petition, said fines of $350 are in such comparatively small amounts that their imposition could have properly, under the evidence, been imposed for any one of the four violations mentioned in the petition. And in the course of the opinion in said Gompers case the Court makes statements which we think are peculiarly applicable to the present case, and against counsel's contention, (p. 440): "If then this sentence for criminal contempt was erroneously entered in a proceeding which was a part of the equity cause, it would be necessary to set aside the order of imprisonment, examine the testimony and thereupon make such decree as was proper, according to the practice in equity causes on appeal.

And, if upon the examination of the record it should appear that the defendants were in fact and in law guilty of the contempt charged, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. * * If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'Judicial power of the United States' would be a mere mockery."

Counsel's third contention is, that the evidence introduced before the chancellor is insufficient to sustain the four specific violations of the injunction, mentioned in the petition. No useful purpose will be served in a further discussion of the evidence bearing upon the contention. Suffice it to say that, in our opinion, the evidence is amply sufficient to show willful violations on the part of the defendants in each of the four particulars charged. And we think that it was proper for the court, after directing the payment of a fine of $250 by George and Elden Simpson, each individually, to further direct that each stand committed to jail "until said fine is paid or he is discharged according to law." (People v. Seymour, 191 Ill. App. 381, 395; Kanter v. Clerk of Circuit Court, 108 Ill. App. 287, 303; Kettles v. People, 221 Ill. 221, 233.)

Our conclusion is that the order of the Circuit court, entered December 1, 1924, should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

205 - 30058

4264

STANDARD TRUST & SAVINGS BANK,
Appellant,

vs.

WILLIAM N. ARMSTRONG and
CAROLINE E. ARMSTRONG, his wife,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 673

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On November 13, 1923, the complainant bank filed its bill, in aid of executions on its two judgments against the defendant, William N. Armstrong, to set aside as fraudulent certain conveyances of a piece of improved real estate on Maple Avenue in Berwyn, Illinois, by said Armstrong and wife to a trustee and by said trustee to said wife, Caroline E. Armstrong. The master, to whom the cause was referred, found for the defendants, and on January 23, 1925, the court, after overruling exceptions to the master's report, entered a decree dismissing the bill for want of equity and complainant appealed.

Some of the master's findings of fact, supported by the evidence, are in substance as follows: That in October, 1923, the complainant bank recovered the two judgments, aggregating $8400, against William N. Armstrong, and executions were issued thereon which remain unsatisfied; that on January 31, 1923 (nearly two years before said judgments were entered) the conveyances in question were made, each deed reciting a consideration of "ten dollars and other good and valuable considerations;" that the defendants were engaged to be married in May, 1907, and shortly afterwards jointly purchased a horse, buggy and harness, which in February, 1908, were given in part payment of the then vacant land in question; that the consideration for the land was $1200 - the

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horse, buggy and harness being figured in the transaction at $500, and said William N. Armstrong (who took title in his name) giving his note and mortgage for the balance of $700; that in May, 1909, the defendants began the construction of a house on the land, which was completed in September, 1909, during which month they were married, and that they then moved into the house and have occupied it ever since as a homestead; that before her marriage, from August, 1904, until January, 1909, Caroline E. Armstrong worked as a stenographer in Chicago at a salary of $18 per week, and from January, 1909, until about the time of her marriage, in another capacity at a salary of $80 per month; that she kept a savings account in a Chicago bank, and, out of her savings and about the time the house was completed, she turned over to William N. Armstrong $1200 towards a payment on the original purchase price of the land and the cost of the house; that she and her husband also signed a note for $3500 towards the cost of the house (which was about $6,000), - said note being secured by a mortgage on the property, which mortgage to the extent of $3,000 is still existing; that thereafter she paid various sums out of her individual funds for various improvements made on the house; that she paid all taxes on the property from the time it was acquired until the time of the hearing; that during 1919 she advanced to her husband the sum of $1,000, procured from her mother, and during 1921, the further sum of $2150, being the proceeds of certain liberty bonds sold; and that up to the time of said conveyance of January 31, 1922, she had put into said property the total sum of $3,676.02, and had advanced to her husband the further sum of $3,150, or a total of $6826.02, no part of which has ever been repaid to her.

It is stated in substance in the master's report that on the hearing complainant contended that said conveyances of January 31, 1922, were mere shams and were made without consideration

and with the intention of defrauding it, and that on the other hand defendants contended that the conveyances were valid and supported by a good and valuable consideration, in that the land was purchased and the house built largely with money furnished by Caroline E. Armstrong out of her individual funds, which had not been repaid to her, and that said conveyances were not fraudulent either in fact or in law. The master concluded that said conveyances were valid and given for a real consideration, and that in their making "no fraud was practiced by either of the defendants upon complainant," and he recommended that complainant's bill be dismissed for want of equity.

The evidence further shows that William F. Armstrong had been president of Ben. J. Hocking & Bro., a corporation, which was in bankruptcy; that said corporation had had banking relations with complainant, commencing in 1918; that Armstrong had given his individual guaranties on certain of the corporation's notes held by the complainant bank; that the notes on which the judgments in question had been obtained, with others, had been given by him to take up his guaranties; and that said notes, although dated October 1, 1921, were not actually delivered to the bank until some time in February, 1922, and after the conveyances in question of January 31, 1922, had been made. Practically all of complainant's evidence was limited to the formal proof of the making of the conveyances and the entry of the judgments and the issuance of the executions. The evidence of the two defendants was uncontradicted and there was no evidence tending to show that Mrs. Armstrong, at the time the property was conveyed to her had any knowledge that her husband was indebted to complainant, or that her husband was about to deliver the notes, afterwards put in judgment by complainant, in place of his guaranties.

After a careful review of the present transcript we are of the opinion that the action of the trial court in dismissing complainant's bill for want of equity was warranted by the facts

disclosed. "The law is well settled that a debtor in failing circumstances may prefer one creditor to the exclusion of others, where he does so in good faith, for a valuable consideration; and the wife may be preferred by the husband, if she is a bona fide creditor, and the conveyance is made in good faith, and based upon a valuable consideration." (Frank v. King, 121 Ill. 280, 283; Tomlinson v. Matthews, 98 Ill. 178, 188; Earl v. Earl, 186 Ill. 370, 374; German Ins. Co. v. Hartlett, 188 Ill. 165, 174; Behrens v. Steidley, 196 Ill. 303, 306.) In the case last cited it is said: "We have repeatedly held that under our Statute of Frauds and Perjuries, in order to set aside a conveyance on the ground that it was made to hinder and delay creditors, it must appear that both parties participated in the fraud; and that the conveyance may have the effect to delay and hinder the creditors does not, of itself, bring a case within the statute. (Waing v. Runkle, 90 Ill. 449; Hessing v. McCloskey, 37 id. 341.) It is clear from the evidence in this case that at the time of the conveyance to Rice, and by him back to the daughter, as between William A. Steidley and his wife, it was equitable and just that the title should be placed in her. At that time there were no liens of his creditors against the land, and she having obtained the legal title without any intent or purpose to defraud or delay creditors, her title is legal, and in no proper sense, under the statute of Frauds, hinders or delays her husband's creditors." Although in the present case the evidence does not disclose that, when Mrs. Armstrong made the advancements to her husband for the purchase of the land, the building of the house and the improvements thereon, and the other advancements, her husband gave her any notes or memoranda evidencing the same, we think that said advancements constituted a valid, subsisting debt owing to her by him, and that at the time of said conveyances of January 31, 1923, she was a bona fide creditor to the

extent of said advancements. Furthermore, there is evidence that the land was purchased and the house built for a homestead, and was at the time of the hearing still occupied by them as such, and that, while the legal title thereto remained in the husband until the date of said conveyances, the equitable title was at all times, because of said advancements and the bona fide understanding of the husband and wife, considered to be in the wife. She paid for all improvements on the house and also paid the taxes accruing each year. And we think that the effect of said conveyances, made in consideration of said advancements and said payments, was to put the legal title in her, where it properly belonged, and that said conveyances under the evidence cannot be considered as fraudulent as to complainant, particularly so as it does not appear that, at the time of said conveyances, she had any knowledge of her husband's indebtedness to complainant, which he afterwards evidenced by the notes on which the judgments were entered. And we think that the facts of the present case are substantially different from those in Hauk v. Van Ingen, 196 Ill. 20, and Kennard v. Curran, 239 Ill. 122, relied upon by complainant's counsel. And, in our opinion, no reversible error was committed by the chancellor in overruling all of complainant's exceptions to the master's report and in refusing to strike from the record certain testimony and exhibits introduced before the master.

Our conclusion is that the decree of the superior court, dismissing complainant's bill for want of equity, should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., concurs; Fitch, J., dissents.

4865

223 - 30076

JOHN G. ERICKSON,
Appellee,

vs.

ISIDORE J. SCHILLER, doing business as I. J. Schiller & Co.,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

239 I.A. 673

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 27, 1924, in an action in assumpsit, the Honorable I. L. Weaver, then acting as a judge of the County court of Cook county, entered an order on plaintiff's motion in said cause, wherein he found that defendant had made default by reason of his failure to file an affidavit of merits to plaintiff's statement and affidavit of claim, assessed plaintiff's damages at $600, and entered judgment against defendant in said sum. On October 9, 1924, defendant's motion, supported by the affidavits of one of his attorneys, to vacate said judgment, and for leave to file an affidavit of merits instanter, came on for hearing before the Honorable John D. Biggs, then acting as a judge of said court, resulting in the court refusing to grant the motion. Defendant appealed.

Plaintiff commenced his action on January 5, 1924, and on the same day filed a declaration, consisting of two special counts and the common counts. All were to the effect that on April 11, 1922, defendant became and was indebted to him in the sum of $600, for money had and received. On the reverse side of the last page of the declaration appears, under the heading "Plaintiff's Affidavit of Amount Due," the affidavit in proper form of W. B. O'Brien, stating "that the demand of the plaintiff

* * is for money had and received by the defendant from the plaintiff, and that there is due to the plaintiff from the defendant, after allowing to defendant all just credits, deductions and set-offs, six hundred ($600) dollars." Defendant, in apt time, entered his appearance by a firm of attorneys, and filed a plea of the general issue to the entire declaration, but failed to file any affidavit of merits.

It appears from the bill of exceptions that defendant's motion to vacate said judgment was in writing in which his attorneys made the following points, among others: (1) That plaintiff's affidavit of claim does not sufficiently state, in compliance with Section 55 of the Practice Act, the "nature" of his demand, or that W. B. O'Brien, the affiant, is either the agent or attorney of plaintiff; (2) that it does not appear that any notice was given to defendant or his attorneys of the application to take the default for want of an affidavit of merits, although at the time his appearance and his plea of the general issue were on file; and (3) that the affidavits of one of defendant's attorneys accompanying the motion to vacate the judgment show a meritorious defense to the whole of plaintiff's demand and a reasonable excuse on the part of defendant's attorneys in not causing an affidavit of merits to be filed with defendant's plea.

We do not think there is any merit in the first two points of counsel. In our opinion under the provisions of Section 55 of the Practice Act, the nature of plaintiff's demand is sufficiently set forth; and, although the affidavit of plaintiff's claim does not itself state who the affiant is, it sufficiently appears from the record that he is one of plaintiff's attorneys; and, under said section 55, no notice is required before taking a default for want of a defendant's affidavit of merits. (Cramer v. Commercial Men's Association, 260 Ill. 516, 521.)

As to counsel's third point we have carefully read the affidavits of one of defendant's attorneys filed in support of said motion, and, although it appears therefrom that certain facts are set forth tending to show that defendant might have a defense to plaintiff's claim, no reasonable excuse is set forth why defendant's attorneys, knowing the provisions of said section 55, did not file an affidavit of merits on behalf of their client. In other words, their negligence is not so doing clearly appears. It is stated, as an excuse for not noticing that an affidavit of claim accompanied plaintiff's declaration, that said affidavit was "on the reverse side of the third sheet" of the declaration, and was "overlooked" for this reason, and for the further reason, as stated in substance, that, because of certain confusion existing in the law offices of defendant's attorneys, such confusion "caused a hurried preparation of the plea" without an affidavit of merits. It is well settled in this State that, upon a motion to set aside a default judgment and for a trial upon the merits, both diligence and merits must appear. (Barrett v. Queen City Cycle Co., 179 Ill. 68, 69; Hartford Life Ins. Co. v. Rossiter, 196 Ill. 277, 278); that, even though it appears that defendant has a meritorious defense, the default will not be set aside if he or his attorney has been guilty of negligence (Pfaff v. Pacific Express Co., 251 Ill. 243, 247); and that such a motion is addressed to the sound legal discretion of the trial court; and, unless it appears that such discretion has been abused, a reviewing court on appeal will not interfere. (Eggleston v. Royal Trust Co., 205 Ill. 170, 178; Culver v. Brinkerhoff, 180 Ill. 548, 552.) After a careful consideration of the present transcript we are unable to say that the trial court (Judge Biggs), in refusing to vacate the judgment, entered by Judge Weaver on September 27, 1924, was guilty of any abuse of the discretion vested in him.

Accordingly, the order of October 8, 1934, wherein the County court refused to grant defendant's motion to set aside the judgment for $600, rendered against the defendant on September 27, 1934, will be affirmed, leaving said judgment standing in full force and effect.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

486 Ia

328 - 30181

JOYCE, REYNOLDS & COMPANY,
a corporation,
Appellant,

vs.

WILLIAM GANSCHOW COMPANY,
a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

239 I A. 673

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Joyce, Reynolds & Company, complainant in the trial court, seeks to reverse a decree of the Circuit court of Cook County, entered October 18, 1924, sustaining defendant's demurrer to complainant's bill and dismissing it for want of equity.

Complainant claims the right to recover commissions on sales of defendant's capital stock made by complainant, or made by defendant itself, and prays for a discovery and an accounting. The basis of the bill is a written agreement, set forth in haec verba, dated May 12, 1923, and being in the form of a letter addressed to defendant and drafted and signed by complainant and marked "accepted" by defendant. Its material portions are as follows:

> "Your company appoints Joyce, Reynolds & Company its sole and exclusive agent for the sale of your stocks on the following terms, viz:
>
> The Common stock is to be sold at $25 per share.
>
> The Preferred stock is to be sold at $100 per share.
>
> All stocks shall be sold for cash in the amount of at least 33-1/3% of the purchase price and notes for the balance covering a period of not over eight months, such notes drawing 7% interest.
>
> You are to pay us a commission of 30% on all Common Stock sold, and 10% on all Preferred Stock, said commission to be paid us on the total sale when cash and notes are received by you.
>
> We are to circularize and advertise your issue over our name as brokers, are to put a force of salesmen immediately to work in your issue, and it is understood

that we are to sell at least $25,000 par value of your Common stock per month beginning June 1st, 1923, otherwise you will have the right to terminate this agreement by giving ten days' notice in writing, it being further understood that in case we do sell Common Stock to the amount of $25,000 monthly as above stated, then we shall retain the exclusive right to the sale of your stock until all your Common stock is sold.

We agree to use our best efforts, organization, lists and investment banker's affiliation to sell your issue of stocks, and further agree to purchase and pay for all stock as rapidly as it is subscribed for and fully paid by our clients. * *.

The above is our understanding of the situation and acceptance by you will constitute an agreement by us, and we are to receive commissions on all stock sold beginning May 14, 1923."

It is alleged in the bill in substance that, in accordance with the provisions of the agreement, complainant proceeded to sell both kinds of defendant's stock, to circularize and advertise them in complainant's name as brokers, to put a force of salesmen immediately at work and to use complainant's best efforts, organization, lists, etc., to sell the stocks; that complainant, as agent for its clients, purchased and paid for all stock, as rapidly as subscribed for and fully paid by said clients, and performed all other provisions and conditions of the agreement; that it "did not sell at least $25,000 par value of the common stock per month beginning June 1st, 1923," owing to "general market conditions and depreciation existing in the investment market;" that, notwithstanding its failure to sell such amount of such stock monthly, it is still entitled, under the terms of said agreement, "to all the rights as an exclusive agent to commissions for the sale of said stock precisely in the same manner and under the same conditions as if it had sold at least $25,000 par value of the common stock, inasmuch as in and by the terms of said agreement the defendant corporation is held obligated to the terms of said agreement regardless of the amount of stock sold, but has the option to terminate by giving ten days' notice in writing," and defendant

corporation "has not exercised said option or right to terminate the agreement by giving ten days' notice in writing, nor has it exercised the option in any other manner;" that on June 22, 1923, complainant, as such agent, was the procuring cause of two sales, each for 50 shares of said common stock, one to Mathilde Lamparter and the other to Sophie Lamparter, for which each paid to defendant the sum of $1250, yet defendant has failed and refused to pay to complainant its commission due thereon, amounting for both sales to $500; that defendant, either itself or through agents other than complainant, has made other sales of said stock, contrary to the terms of the agreement, but as to the amount thereof complainant has no exact or accurate knowledge; and that complainant has frequently requested defendant to account to it for the commissions due on said sales, but that defendant has refused so to do. The bill prays for such accounting and that defendant be ruled to answer certain interrogatories, viz: (a) What were the total sales of defendant's stock (both common and preferred), negotiated either directly by defendant or through agents other than complainant after May 14, 1923? (b) What were the total amounts received by defendant from said sales? (c) Who were the brokers employed by defendant to negotiate said sales? (d) What are the names and addresses of the people to whom said sales were made?

It appears from the terms of the agreement in substance that, beginning May 14, 1923, complainant is given the exclusive agency to sell the common and preferred stock of the defendant corporation at certain fixed prices and terms and for certain stipulated commissions; that, beginning June 1, 1923, complainant is to sell per month at least $25,000 par value of defendant's common stock, and if it does not do this defendant shall have the right or option to terminate the agreement upon giving ten days' written notice; and that it is "further understood" that in case complainant

does sell defendant's common stock to the amount of $25,000 monthly, then and in that event complainant "shall retain the exclusive right" of sale of all of defendant's stock until all the common stock is sold. We think this last mentioned clause and the preceding clause, wherein defendant is given the option to terminate the agreement on ten days' written notice in case complainant does not sell the required amount per month of the common stock, are conflicting, but we think that by said last mentioned clause the real intention of the parties clearly appears, viz, that if complainant does not sell the required amount per month of the common stock then and in that event complainant is not to retain the exclusive right of sale of the stock. Although the bill admits that it "did not sell at least $25,000 par value of the common stock per month," as required, complainant bases its right to the equitable relief prayed for solely because, as alleged, defendant did not exercise its option to terminate the agreement by giving the ten days' written notice to that effect. We do not think that, under the provisions of the contract and the allegations of the bill, complainant has shown a clear right to the main relief asked, viz, a discovery and an accounting. The allegation that complainant is entitled to commissions for the sales of stock to the Lamparters is merely incidental to that main relief, and if complainant is entitled to said commissions it has a full and adequate remedy at law for their recovery. Furthermore, it is the law, as we understand it, that the giving by defendant to complainant of the exclusive agency to sell the former's stocks, as distinguished from the exclusive right to sell the same, did not preclude the former from itself making sales of the stock without liability to the latter for commissions thereon, especially so where complainant admits that it failed in its agreement to sell the required amount per month of the common stock. (10 A. L. R., note, pp. 814-818; 20 A. L. R. note, p. 1270;

9 Corpus Juris, p. 622, Sec. 101; Ingold v. Symonds, 125 Iowa 82, 85; Greene v. American Malting Co., 153 Wis. 216, 221; Gilbert v. Coons, 37 Ill. App. 448, 449; Smith v. Preiss, 117 Minn. 392, 393; Dain v. Loeffler, 256 Pa. St. 319, 322.) Furthermore, in our opinion, it appears from the allegations of the bill that complainant is seeking by way of a discovery and an accounting to recover commissions to which it is not equitably entitled.

The decree of the Circuit court sustaining the demurrer to complainant's bill and dismissing the bill for want of equity is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

487a

57 - 30305

FRED W. SIMPSON, doing business as Acme Minerals Co.,
Complainant and Defendant in Error,

vs.

GEORGE H. SIMPSON et al.,
Defendants.

GEORGE H. SIMPSON,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

239 I.A. 673

PER CURIAM.

This writ of error has been consolidated for hearing in this appellate court with appeal case, No. 30039, in which an opinion has this day been filed. For the reasons stated in that opinion the order of the Circuit court of Cook County, entered December 1, 1924, and called in question by this writ of error, is affirmed.

AFFIRMED.

530.1.C53

2M 2-4-25

Fred W. Simpson, trading as Acme Minerals Company, complainant and defendant in error, v. George M. Simpson et al., defendants. George M. Simpson et al., plaintiffs in error.

Gen. ~~No.~~ 30,306.

Nov.

~~or to the~~ Municipal Court of Chicago;
Superior Court of Cook county;
~~peal from the~~ Circuit Court of Cook county;
County Court of ~~_____~~ county;

Hon. Dan Ryan, Judge, presiding. Heard

the Branch Appellate Court

~~____~~ this court fourth ~~first~~ district at the October term, 1925,

~~rmed~~ on appeal ~~opinion~~ in Gen. No. 30,039, ante.

~~ersed~~

~~ersed and remanded with directions.~~

~~non~~ filed December 8, 1925. Rehearing denied December 21, 1925.

~~for appellants.~~

for plaintiffs in error.

~~for appellees.~~

for defendants in error.

~~SIDING JUSTICE~~ delivered the opinion of the court.

4866

38 - 30306

FRED W. SIMPSON, doing business as Acme Minerals Co.,
Complainant and Defendant in Error,

vs.

GEORGE H. SIMPSON et al.,
Defendants.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

239 I.A. 673

GEORGE H. SIMPSON et al.,
copartners, etc.,
Plaintiffs in Error.

PER CURIAM.

This writ of error has been consolidated for hearing in this appellate court with appeal case, No. 30038, in which an opinion has this day been filed. For the reasons stated in that opinion the order of the Circuit court of Cook County, entered December 1, 1924, and called in question by this writ of error, is affirmed.

AFFIRMED.

240 - 30093

4562

ROSE M. LONG,

Appellee,

vs.

EMMIL M. SOBOLT,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

239 I.A. 674

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for an alleged libel contained in a letter written and mailed by defendant and upon trial had a verdict for $20,000.00, which, upon order of the court, was remitted to $10,000.00. From the judgment thereon, defendant appeals.

Defendant was in the business of manufacturing and selling women's clothing, and plaintiff, a married woman, was an employee. Defendant, now Mrs. Sobolt, was formerly married to a Mr. Doll, from whom she obtained a divorce. For a time plaintiff and defendant were apparently friends. Occasionally they went together to social entertainments, accompanied by Dr. Sobolt and defendant's former husband, Mr. Doll. Mr. Long, plaintiff's husband, was out of town frequently and seemingly knew that Mrs. Long went to these parties with Mr. Doll as her escort.

The companionship between defendant's first husband and plaintiff is only pertinent as furnishing some basis for the suggestion that defendant was moved to her subsequent acts of hostility against plaintiff by some things occurring at these times.

S801.A.074

In the Fall of 1921 plaintiff was discharged from her employment, and defendant says that in retaliation plaintiff wrote an anonymous letter, under date of September 7, 1921, to the Dress Manufacturers Association in New York City charging defendant with unfair business dealings with this association. Defendant thereupon, on September 8, 1921, wrote and mailed the letter to the Dress Manufacturers Association which is the subject matter of this suit. Defendant also at about this time commenced an action for libel against Mrs. Long, who, not appearing at the trial, suffered a judgment for $1,000.00; thereafter she was arrested on a capias satisfaciendum and put in jail and subsequently released upon payment of the judgment.

Mrs. Long, plaintiff herein, says that, while endeavoring to locate the letter which was the basis of the libel suit against her, she was shown by parties in New York the letter written by defendant, then Mrs. Doll, and based upon the contents thereof commenced the present libel suit. This letter is as follows:

"Chicago, Ill. Sept. 8th, 1921.

"The Dress Manufacturers Assn.
Marbridge Bldg.,
New York City, New York.

Gentlemen:

Suit has today been started against Rose Long, an ex-employe, for malicious slander, to the amount of twenty thousand. She, as I have been informed, has written you a letter claiming I am connected with a manufacturing concern, the lie, as she told has been cleverly woven around the incident of over a year ago when Mr. Gershel of the Rose Davis Dress Co., at the time, created a disturbance, which resulted in apologies from Mr. Davis and an effort by Mr. Mendelsohn of the Association to rectify the mistake made.

Rose Long is a young married woman who has openly forgotten the holiness of marriage vows; when she was discharged, she laughed and said 'Why the salaries you pay wouldn't buy my silk underwear, and if you ever tell my husband, I'll put you out of business.'"

Will you be kind enough to take a copy of her letter, if you wish it, and mail the origin to my attorney, A. D. Cash, 118 No. LaSalle Street, Chgo.

Very truly,

Ethel M. Doll."

Considering the points in the order made in the defendant's brief, it is first argued that there was no publication for the reason that there is no evidence that there is any concern called "The Dress Manufacturers Assn.," the addressee of the letter. There is a concern called the Associated Dress Industries, with an office in the Marbridge Building, in New York City. It is a fair inference that defendant's letter was delivered to this concern, for in December, 1921, when plaintiff was making inquiries in New York to locate the anonymous letter ascribed to her, she was shown by a Mr. Sandrowitz in the office of the Associated Dress Industries the letter written by defendant. Mr. Sandrowitz read this letter, which is set out above, and handed it to plaintiff to read. Subsequently, in June, 1922, plaintiff saw the same letter in the possession of a Mr. Mossesohn in the same office, who read portions of it aloud.

Defendant's plea of justification, which is in the nature of confession and avoidance, admits the publication. Encyclopedia of Pleading and Practice, Vol. 18, p. 60; 37 C. J. 44; Campbell vs. Masonic Chronicler Publishing Co., 214 Ill. App. 601.

The evidence proved a publication. Each reading of the

letter is, in law, a publication. Townsend on Libel, (4th Ed.) Sec. 117. If any third person read the letter, there was a publication of it. McLaughlin vs. Schnellbacher, 65 Ill. App. 30. A libel is deemed published as soon as it passes out of the defendant's possession. Odgers on Libel and Slander, (5th Ed.) 162.

It is next said that the declaration sets up no cause of action, on the theory that the words used in the letter are not libelous per se, and hence the absence of an innuendo in the declaration is fatal. The words in question contained in the letter are as follows:

> "Rose Long is a young married woman who has openly forgotten the holiness of marriage vows; when she was discharged, she laughed and said 'Why the salaries you pay women't buy my silk underwear, and if you ever tell my husband, I'll put you out of business.'"

If the words used in their common acceptation tend to impeach the virtue or reputation of the person defamed, they are actionable per se. Sec. 395, Chapter 38, Illinois Statutes (Cahill). Such words must be taken in the sense which readers of common and reasonable understanding would ascribe to them. People vs. Fuller, 238 Ill. 116; People vs. Spielman, 318 Ill. 482. It is not necessary that they shall technically charge a crime. It is sufficient to give the words the meaning that men of ordinary affairs would give them. Ransom vs. McCurley, 140 Ill. 626; Schmissaur vs. Greilich, 92 Ill. 347; Hunner vs. Evening American, 175 Ill. App. 416.

Applying these principles to the language of the letter, the conclusion is inevitable that men of ordinary affairs and readers of common and reasonable understanding would

understand those words to charge plaintiff with open unchastity with men for money. No other reasonable meaning can be derived from them. Charges of such conduct are usually made by circumlocut or euphemism. Quite pertinent is the observation from Townsend on Libel, Sec. 143, asfollows:

> "There is no offense which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene, in broad and coarse language."

It is mere casuistry to say that forgetfulness of the marriage vows is consonant with innocent conduct. The entire phrase must be considered, and this leaves no room for uncertainty as to what the letter charged.

Neither does it avail the defendant to claim that she used the words in the letter with innocent intent. What the writer has in his mind cannot excuse the use of language which commonly is capable only of a defamatory meaning. Miller vs. Johnson, 79 Ill. 88; Klam vs. Badger, 23 Ill. 446.

Where the words used are libelous per se, no inducement, colloquium or innuendo are necessary. Klam vs. Badger, 23 Ill. 448; Hunner vs. Evening American, 175 Ill. App. 416; Jacksonville Journal Co. vs. Seymer, 42 Ill. App. 443; Morey vs. Talbot, 189 Ill. App. 1.

Defendant argues that the giving of instruction 3 at the request of plaintiff was erroneous. This is as follows:

> "If you believe from a preponderance of the evidence that the letter complained of in this case was written by the defendant, and published, and was libelous of plaintiff, then, even if you should believe from the evidence that the words uttered in said letter were true, still, unless you believe from a preponderance of all the evidence that the said letter was written and published with good motive and for justifiable ends, the truth of the words uttered in said letter would not be a defense.'

This is a correct statement of the law. It has been definitely held in Owen vs. Rockford Star Printing Co., 248 Ill. 408, that under Section 4 of Article II of the Constitution of Illinois, which is the constitution of 1870, the truth is a defense to either a civil or criminal libel suit only when published with good motives and for justifiable ends.

Furthermore, this was the theory of defendant upon the trial, as shown by instruction 15 given at her request, which substantially states the law as stated in plaintiff's instruction 5. Even if defendant were correct in her position in this court that proof of good motives and justifiable ends is unnecessary, which she is not, she cannot now complain of an error in an instruction when a like error appears in an instruction given at her request. C. & A. R. R. Co. vs. Harrington, 192 Ill. 10.

This last citation is also a sufficient answer to the suggestion that the definition of libel, as it appears in Sec. 396, Chapter 38 of the Criminal Code, is not applicable to the present case, and that the applicable definition is in Sec. 1, Chapter 126, Slander and Libel. It is unnecessary to discuss the distinction between the definitions, for the trial court, at the request of defendant, gave the jury in instruction 9 the definition of libel in the words of Sec. 396, Chapter 38 of the Criminal Code. She cannot now assert this to be error.

Instruction 4 was proper in telling the jury that mental suffering of plaintiff, if proved, was an element of damages to be considered. Moore vs. Keasy, 152 Ill. App. 647; Adams vs. Smith, 58 Ill. 417; O'Malley vs. Illinois Printing & Publishing Co., 194 Ill. App. 544.

Instruction 6, given at the request of plaintiff, was proper in permitting the jury, if it found defendant guilty,

to assess compensatory damages and exemplary damages, and instruction 8 is not open to the criticism that it permits the jury to find punitive damages as a third kind of damages. Instructions 6 and 8 correctly state the rule as to the measure of damages. Gusly vs. Hardin, 23 Ill. 382; 27 C. J. 125.

It was not error to refuse instruction 20 tendered by defendant, for it omitted entirely the element that publication must be for good motives and justifiable ends. This same omission is in other properly refused instructions. Other instructions refused by the court were substantially covered by other given instructions. We find nereversible error with reference to the court's rulings upon the instructions.

Under the plea of justification, defendant was bound to prove the truth of the charge and that it was published with good motives and for justifiable ends. Ogren vs. Rockford Star Printing Co., 280 Ill. 405.

Defendant introduced considerable evidence which it is claimed tended to support the truth of the charge as defendant says she intended it to be understood. Several witnesses testified as to statements made by plaintiff and her conduct at various times. These are for the most part categorically denied by plaintiff and her husband. Even if the stories of defendant's witnesses should be believed they do nothing more than tend to prove that plaintiff did and said things which were foolish and unbecoming in a married woman. They do not prove the truth of the serious charge made by defendant in her letter.

Defendant also not only failed to prove that she published the charge with good motives and for justifiable ends, but the circumstances clearly show the contrary. She wrote the letter moved by anger and in revenge for plaintiff's

alleged authorship of the anonymous letter attacking defendant's business integrity. This is demonstrated beyond any reasonable controversy. No sufficient defense was proven, and the verdict of guilty was the only possible one on the record.

Earnest criticism is made of the conduct of plaintiff's attorney upon the trial, both in his examination of witnesses and in his argument to the jury. It may be conceded that her attorney adroitly succeeded in giving the jury the impression that plaintiff, an employee, was the victim of persecution by her former employer to the extent of having plaintiff placed in jail as a result of a fictitious charge of writing an anonymous letter about defendant. Whether these tactics were justified or not, they did not affect the question concerning the good motives and justifiable ends moving defendant to publish her charge against plaintiff. Defendant's failure in this regard appears from the undisputed facts in evidence.

However, it is evident that the jury was unduly influenced as to damages by the picture drawn by plaintiff's attorney as shown by the large verdict of $20,000.00. The trial court properly undertook to correct this by requiring a remittitur of $10,000.00. We are of the opinion that the remittitur was not sufficiently large, and that $5,000.00 would properly cover both compensatory and exemplary damages. If, therefore, within ten days from the filing of this opinion, plaintiff will file a remittitur of $7,000.00, leaving the judgment at $3,000.00, it will be affirmed with the costs of this appeal taxed against appellant; otherwise, for the reason that in our opinion the judgment

of $10,000.00 is excessive, it will be reversed and the cause remanded.

AFFIRMED upon remittitur of $7,000.00; otherwise REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

277 - 30130

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOSEPH HEIT,
Appellee,

vs.

CITY OF CHICAGO, HON. WILLIAM E. DEVER, Mayor, AL. F. GORMAN, Clerk, and MORGAN A. COLLINS, General Superintendent of Police of the City of Chicago,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

239 I.A. 674

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an order of the Superior court awarding the writ of mandamus, in accordance with the prayer of petitioner Heit for a license for a soft drink parlor at 1305 Sedgwick street, Chicago. The petitioner does not appear in this court.

When petitioner's right is doubtful the writ of mandamus should be denied. Kennedy v. City of Chicago, 320 Ill. 485. It should not issue except to prevent a denial of justice. Kocner v. Kocner, 293 Ill. 370. The mayor of the city is vested with discretionary power in the matter of the granting or refusing of such licenses, and the writ of mandamus will not issue to compel such an officer to exercise his discretion in any certain way. People v. Webb, 254 Ill. 364. It will only issue where there is an arbitrary abuse of discretion, amounting to a denial of justice. 18 R. C. L. 124; Harrison v. People, 222 Ill., 190. In the recent case of Carpenter v. Dever, Appellate court number 29342-3, filed February 3, 1925, the opinion of the Second Division cites a large number of cases establishing these propositions. They have been so frequently stated that further repetition is unnecessary.

The so-called "soft drink parlor" had belonged to one John Abram, and an application for a license in his name had been made and refused. In October, 1924, Neit, the petitioner, says he bought the business from Abram. Neit runs a shoe repair business at 2105 Larabee street. After Neit bought the place Abram still continued to run the soft drink parlor, paying the rent, and the receipts therefor were made in Abram's name. Neit never paid any rent. Neit also testified that he did not know who owned the building and that the owners of the building did not know anything about him.

From these and other facts in the case it is established that Neit, the petitioner, was in collusion with Abram so that Neit could procure a license in his own name but Abram would continue to run the business as theretofore. Clearly, there was no abuse of discretion in refusing to issue the license to Neit.

The judgment of the Superior court is reversed.

REVERSED.

Matchett, P. J., and Johnston, J., concur.

135 - 29971

MARY N. YOUNG, Administratrix of the Estate of Louis N. Young, Deceased,

Appellant,

v.

JOHN W. PATRICK, JR.,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

239 I.A. 674

Opinion filed Dec. 23, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the plaintiff administratrix seeks to reverse a judgment entered in the Superior Court of Cook County, in favor of the defendant and against her. This judgment was based on a verdict finding the defendant not guilty, which verdict was returned pursuant to a peremptory instruction to that effect, given by the court at the close of all the evidence. The plaintiff's action against the defendant was for damages occasioned by the death of her father, Louis N. Young, and it was admitted by the defendant that his death resulted from injuries received by him when he was struck by an automobile driven by the defendant.

The accident in question occurred near the northeast corner of the intersection of Hinman avenue and Lee street in the city of Evanston, early in the evening of August 9, 1923. It occurred at about dusk on that evening,

but before the street lamps were lighted. Hinman avenue is a north and south street and Lee street runs east and west. Each street has a roadway of approximately thirty feet in width and is paved with macadam. At the time in question the pavement had been oiled but it was not greasy or slippery and is described in the testimony as being dry. There were no eyewitnesses to the collision, other than the two parties immediately concerned. The automobile being driven by the defendant was a Ford, five passenger sedan. There is a jog of about 30 feet in Hinman avenue at Lee street. The testimony is to the effect that the sidewalk on the west side of Hinman avenue, south of Lee street, is about opposite the sidewalk on the east side of Hinman avenue, north of Lee street. The defendant was driving his car north in Hinman avenue and apparently struck the deceased at or near the crosswalk on the north side of Lee street and on the east side of Hinman avenue. It is not shown whether the deceased was walking east or west at the time of the accident.

Having no eye-witness of the occurrence, the plaintiff produced a number of witnesses who testified that the deceased was habitually very careful in crossing streets and never attempted to run across ahead of approaching vehicles, and always looked both ways before proceeding over a crossing. This testimony was admitted over objection of the defendant, on the ground that there was an eye-witness to the accident. Upon the occasion of one of these objections counsel for the defendant said, 'I have an eye-witness and tender this witness to counsel now on the question of due

care * * * Of course I know he does not have to accept him." Nothing was said as to who the witness was. Presumably, it was the defendant himself, who under the statute was incompetent as a witness, unless called to testify by the plaintiff. Cahill's Ill. Stat., Ch., 51, sec. 2. Here was a situation where the only eye-witness to the accident was a party to the suit and under the statute, was incompetent to testify, unless called as a witness by the other party. As to whether, under these circumstances, the other party should be precluded from submitting testimony as to the habits of the deceased on the question of due care, we do not decide, as no discussion of that question has been presented.

One Hart, lived in an apartment on the south side of Lee street about 150 feet west of Hinman avenue. He was sitting in his living room at the time in question and he testified that he heard a screeching of automobile brakes and immediately went out into the street, and by the time he reached the corner some people were just lifting the deceased into the defendant's automobile to be taken to the hospital. He testified that the automobile was then standing about ten feet north of the crosswalk on the north side of Lee street and within two feet of the curb on the east side of Hinman avenue. He testified further that he looked down the road in the direction from which the defendant's car had been coming and he saw "two clear marks from the wheels back down the street * * * they were polished wheel marks in the surface of the pavement," and that they extended from the rear of the defend-

ant's automobile a distance of approximately 40 feet in a southeasterly direction. At another point in his testimony he said that as the defendant's automobile stood there, the rear of the car was about 32 feet from the north curb line of Lee street. He further testified that both wheels, according to the marks, of the defendant's car, passed to the west of the center of the intersection of Lee street and Hinman avenue.

It was admitted that the intersection in question was in a closely built up section of the city of Evanston. One Beach, a son-in-law of the deceased, testified that he had driven a Ford touring car for several years, over such streets as Hinman avenue and Lee street, at different rates of speed, and that he had had occasion to observe the distance required to stop a car when it was going at various speeds. He also testified that he had frequently ridden in Ford sedans, which type of car was heavier than a touring car, and that he had observed his friends driving Ford sedans, as to the space required to bring them to a stop, after the brakes were put on. Over the objection of counsel for the defendant this witness was permitted to testify that in his opinion, eight feet was the space required to stop a Ford sedan, going at the rate of 15 miles an hour, - that is that a car of that type could be stopped within that distance when the brakes were put on at a speed of 15 miles an hour. He was then asked how much space it would require to stop the car after the brakes were put on when it was traveling at 20 miles an hour. Objection to that

question was sustained.

He further testified that he went to the hospital to which the deceased was taken on the evening of the accident, and there talked with the defendant, and that in the course of that conversation the defendant said that he was driving his car north "and Mr. Young was crossing the street and he did not see him and ran into him. That was the substance of it." He further testified to another conversation with the defendant, upon the occasion of the coroner's inquest, and at that time the defendant stated that he passed to the left side of the street at the intersection, coming north on Lee street, and that in this connection he said to the witness, "You know how itis, Beach, everybody does that at that place in order to make time."

It was admitted that the deceased had an expectancy of life of six and one-half years, at the time of his death.

The mother and father of the defendant were originally parties defendant in this suit. The plaintiff called the defendant's father as a witness, and he testified that the automobile in question was owned by his wife, who never drove it. The plaintiff thereupon dismissed her suit as to both the father and mother of the defendant, and then rested her case. The defendant then submitted a motion for a peremptory instruction, which the [illegible] court denied. Thereupon the defendant rested his case. He then again submitted his motion for a peremptory instruc-

tion and the court allowed the motion and gave the instruction; following which, the judgment appealed from was entered.

Assuming that the plaintiff properly made out a prima facie case, on the question of the exercise of due care on the part of the deceased, we are of the opinion that the testimony submitted in the plaintiff's behalf was not sufficient to make out a prima facie case, on the issue of the defendant's alleged negligence. One witness heard the sound of automobile brakes, and it is presumed they were made by the defendant's car. The same witness saw wheel marks in the street, and it is again presumed that these were made by the defendant's automobile, with his brakes set; and it is presumed further that he was trying to stop and could not do so, because he was going too fast. The only evidence as to the position of the defendant's car after the accident, is that it was standing within two feet of the east curb of Hinman avenue and about 22 feet north of the corner. It certainly must have come into the part of Hinman avenue extending north of Lee street, well over to the east side of the street. If the defendant did drive to the west of the center line of Hinman avenue at this intersection, that fact would not make out a prima facie case of negligence. Nor would the fact that the defendant told Beach he did not see the deceased, of itself, make out a prima facie case of negligence, nor, in our opinion, does it make out such a case when taken in connection with the other elements contended for by the plaintiff, nearly all of which are presumptions, based for

for the most part on the wheel marks; even assuming those marks to have been made by the defendant's car.

Assuming that the witness Beach should have been permitted to testify further as to the distance within which a Ford sedan could be stopped while being driven at certain speeds, as to which there is some doubt, we would nevertheless be of the opinion that this ought not to work a reversal of the judgment appealed from, for, after all, such evidence would be to no purpose in the absence of any testimony as to the speed of the defendant's car at the time in question. That element of speed all rests upon the alleged wheel marks, and those, in our opinion, are too much involved in conjecture and presumption to be of value. The evidence shows that there was a good deal of automobile traffic north and south along Hinman avenue. We are not only asked to presume that these marks were made by the defendant's car, but that they were caused by the defendant's car after he had practically locked the wheels with his brakes; and we are asked further to presume that the defendant's car skidded the entire distance of 40 feet, because he came into the intersection at such a speed as did not permit of his stopping sooner. In our opinion, the plaintiff's case is so involved in conjecture and presumption as to fall short of the requisite degree of evidence to make out a case that should have been submitted to a jury. We are unable to say that the trial court erred in giving the peremptory instruction in favor of the defendant.

For the reasons stated, the judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

150 - 29995

GABRIEL TYLUTKI,

Appellant,

v.

FRANK ALLPORT,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

239 I.A. 674

Opinion filed Dec. 23, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Tylutki brought this action against the defendant, Dr. Allport, seeking to recover damages alleged to have been suffered by him as a result of unskillful and negligent treatment by the defendant, who had been retained and employed by the plaintiff to treat him. The defendant filed a plea of the general issue and later a special plea, in which he alleged that his undertaking to treat the plaintiff was at the instance of the latter's employer, the plaintiff having received the injury which occasioned the treatment, while in the course of his employment with said employer, the Dryden Rubber Company; and that prior to this time both the plaintiff and his employer had elected to be bound by the Workmen's Compensation Act, and that thereafter the plaintiff had made a claim upon his employer, for compensation under the act and as a result of this claim, the plaintiff had been paid by his employer, under the provisions of the Act, for a certain period of temporary total disability, and thereafter

Dated this [illegible] day of [illegible], 19[illegible].

[illegible]

[illegible]

[illegible]

for a total loss of one of the plaintiff's eyes. It was further alleged by the defendant in this special plea, that the injuries of which the plaintiff complained in his declaration, or the alleged aggravations of the injuries received by him in the course of his employment, were merged into the original injury, and the payments which had been made to the plaintiff by his employer pursuant to the proceedings before the Industrial Commission of Illinois, were a complete payment and satisfaction to the plaintiff for the injuries complained of by him in his declaration. After certain further pleading, which need not here be noted, the plaintiff filed an amended replication to the special plea of the defendant, in which he alleged in substance that the payments he had received under the provisions of the Workmen's Compensation Act, for temporary disability and for the total loss of the use of one of his eyes, did not constitute complete satisfaction to him, for the injury complained of in his declaration, and that the matter so complained of had not been fully atoned for by the proceedings had before the Industrial Commission. The defendant filed general and special demurrers to the plaintiff's amended replication and these were sustained by the trial court. The plaintiff, electing to stand by his amended replication, his suit was dismissed and judgment was entered accordingly, to reverse which he has perfected this appeal.

In our opinion, the question presented by this appeal is entirely covered by the case of Spelman v. Piris, et al. 233 Ill. App. 8, and the cases referred to in that

opinion. For the reasons we there gave, we are of the opinion that in the case at bar the facts pleaded by the defendant in this case, were a complete defense to the plaintiff's right of action, and, therefore, the trial court did not err in sustaining the demurrers which were interposed by the defendant to the amended replication pleaded by the plaintiff to that special plea.

For the reasons stated, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

161 - 30009

BENITA OWITZ, by Philip Owitz, her father and next of kin,

Defendant in Error,

v.

MRS. E. CHINBLOOM and FRED C. SULLIVAN,

Plaintiffs in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

239 I.A. 674

Opinion filed Dec. 23, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendants seek to reverse a judgment for $1600.00, recovered against them by the plaintiff in the Circuit Court of Cook County. The plaintiff brought this action against the defendants to recover damages allegedto have been suffered by her as a result of injuries received in a collision between an automobile, in which she was riding, and another automobile driven by the defendant Mrs. Chindbloom, and which was owned by the defendant Fred C? Sullivan; the latter being present in the automobile when the collision occurred.

The collision occurred at the intersection of Western avenue and Montrose avenue, in the City of Chicago, early in the evening of August 24, 1920. One Nagel was driving a Ford sedan north in Western avenue on the east side of the street between the east curb and the northbound track of a double track street railway located in that street.

The car owned by the defendant Sullivan was a Jeffreys car. It was being driven by Mrs. Chindbloom, east on Montrose avenue in the east bound track of a double track street railway located in that street. These two streets intersect at this point at right angles. The two cars came together at a point in the east bound Montrose avenue car track a little east of the north bound Western avenue car track. The force of the impact threw the Ford sedan against the north curb on Montrose avenue just east of the corner, facing west, and when the Jeffreys car came to rest it was facing north and the front of the car was apparently just south of the west bound Montrose avenue car track. It would seem from the evidence that the front of the Jeffreys car struck the left side of the Ford sedan near the rear. The plaintiff, who was a passenger in Nagel's car, with other members of her family, was a child six years old.

It is urged in support of the writ of error by the defendants, that although the declaration charged joint ownership and joint operation of the car by them, the evidence fails to establish these allegations. As to that it is sufficient to point out that the defendants filed a plea of the general issue only and thus did not put in issue either the element of joint ownership or operation.

At the close of all the evidence the trial court refused certain instructions tendered in behalf of the defendants and at the plaintiff's request instructed the jury to find the issues for the plaintiff. The court then further instructed the jury that the only question they would have to

consider was that of the damages, on which question the court instructed them, following which they returned a verdict, following the court's instruction and finding the issues for the plaintiff and fixing her damages at the amount already mentioned.

The main contention of the defendant is that there was a conflict in the evidence on the question of negligence and that therefore the trial court should have submitted that issue to the jury, and in support of this contention some argument is presented, not only on the question of whether the defendants were shown by the evidence to have been negligent, but also on the question of whether Nagel, who was driving the Ford sedan in which the plaintiff was riding, was guilty of contributory negligence. Being a child of six years, the plaintiff was incapable of contributory negligence herself, nor could the negligence of Nagel, if there were any, affect her rights as against the defendants, provided the evidence established the fact that they were negligent and that their negligence was the proximate cause of the collision which occasioned her injuries. In our opinion the evidence submitted in behalf of the defendants (and the evidence submitted by the plaintiff was to the same effect) was itself sufficient to show that they were negligent and that their negligence was the proximate cause of the injuries complained of. That being the case, the peremptory instruction given by the trial court, for the plaintiff, was warranted.

The first witness called by the defendants was one Kneip. He testified that he was standing on the east side of Western avenue twelve or fifteen feet south of the corner, and that he witnessed the collision. In the course of his testimony it appeared that he did not see the Jeffreys car until it was within about two feet of the point of collision and that he did not see the Ford sedan until it had reached a point in Western avenue just opposite where he was standing. He testified that just before the collision, the Ford car swerved to the east, apparently in an attempt to get around the Jeffreys car before they collided. He further testified that the Jeffreys hit the Ford, and described the respective positions of the two cars after the collision. He said the Ford was going from 20 to 22 miles an hour and that this speed was increased just before the contact. He was asked how fast the Jeffreys car was going at the time of the collision and he answered, "He slowed down. He was going about 13 or 14 miles an hour. A woman was driving." He testified that the Jeffreys hit the Ford "in the back end and turned him around."

One Hart, called for by the defendants, testified that he was riding in the automobile being driven by the defendant, Mrs. Chindbloom. He was sitting in the rear seat. He testified that their car slowed down as they approached Western avenue and Mrs. Chindbloom shifted gears and started over the intersection; and as they cleared the corner, he saw the Ford coming north

on Western avenue about 35 miles an hour and as their car got nearly across the intersection, the Ford swung out in passing them, and the projecting spring of the Jeffreys caught the rear wheel of the Ford. He said the collision occurred east of the east track in Western avenue. On cross-examination he said that when he saw the Ford as he came out on the crossing, it was about 100 feet south of the point of collision. It appears from the testimony of others that there was a building at the southwest corner of the intersection, which was set back 8 or 10 feet from the sidewalk. This witness further testified that he was sitting in the middle of the rear seat and when he reached a point where he was able to see the Ford 100 feet south of the intersection, the front of the Jeffreys car was west of the Western avenue building line. It, therefore, appears that the Jeffreys car traveled from a point west of the west building line on Western avenue to thepoint of collision, which was 10 feet or more east of the east car track on that street, while the Ford was coming from a point approximately 100 feet south of the intersection to the point of the collision in the south track on Montrose avenue. The witness last referred to testified that the car he was in did not drive either to the right or left before the collision, but kept on in a straight line.

The defendant, Mrs. Chindbloom, testified that she was about 30 feet west of the Western avenue car tracks when she first saw the Ford car approaching the intersection from her right, and at that time it was 75 or 80 feet south of the intersection. She said the Ford was being

driven at a speed of 18 or 20 miles an hour and that she was driving her car 14 or 15 miles an hour, until she reached the intersection, when she slowed down to 8 miles and hour and proceeded to cross. She was asked how far the Ford was from the intersection when she started across the tracks and she answered, "It was nearly up to the intersection then. By that time, when I started across, I thought I had plenty of time * * *. When I started across it (the Ford) was about 75 or 80 feet down, - but when I started across it was perhaps half that distance." On cross-examination Mrs. Chindbloom testified that she slowed down from 18 or 20 miles to 8 miles an hour and then kept right on going over the intersection toward the Ford, which was coming north at 18 or 20 miles an hour, and she said she did this because "I thought he would slow down." She further testified that at the speed at which she was going over the intersection she could have stopped her car within a distance of six feet. She was asked if she knew that the law was that a person approaching an intersection from the right had the right of way, and she answered that she did.

The defendant Sullivan was sitting in the front seat beside Mrs. Chindbloom at her right. He testified that he saw the Ford coming from the south as they were passing over the intersection at a speed of something under ten miles an hour, and that the Ford "continued at a high rate of speed," and swerved east as it was passing them and then seemed to swerve back again and then the collision occurred. This witness was asked, on cross-examination

when Mrs. Chindbloom first tried to stop her car and he answered that he would say it was approximately on the north bound or east track of the Western avenue car line; that it was at this point that she tried to put on her brakes, having gone into second speed when she came into the intersection. He was then asked, "All the time you saw this car coming from the south on Western avenue, going at a high rate of speed?" and he answered, "Yes." He was then asked, "And she (Mrs. Chindbloom) kept right on going * * * until she got to within five or six feet of it?" and he answered, "Yes."

As before stated, we are of the opinion that this evidence, submitted on behalf of the defendants, itself, establishes their negligence. We have had occasion to consider a number of cases concerning automobile collisions at street intersections, where the provisions of the statute to the effect that a car approaching such an intersection from the right has the right of way over a car approaching it from the left was involved. In applying that statute to the various situations involved in these different cases, we have endeavored to point out that this so-called law of the road must necessarily be applied to each case in the light of the circumstances involved. In our opinion, the circumstances in the case at bar can leave no doubt of the fact that the rule thus laid down by the statute was applicable and that Mrs. Chindbloom was clearly negligent in driving over the intersection when the Ford car which was approaching her from the

right was close at hand, - she hazarding the guess that the driver of the Ford would yield to her the right of way.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

197 - 30050

PHILIP ROSENSTEIN,
Appellee,

v.

LEWIS ROSE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 675

Opinion filed Dec. 23, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $300.00 recovered against him in the Municipal Court of Chicago, by the plaintiff.

The case was reached for trial on November 20, 1924, and at that time the defendant presented a petition to the trial judge, for a change of venue, in which he alleged that he felt he would not receive a fair and impartial trial before the trial judge, because the latter was prejudiced against him, and further, that said prejudice first came to his knowledge on November 19, 1924. The court denied the petition, whereupon, the plaintiff presented his proof. At the close of the plaintiff's case, counsel for the defendant announced that he did not care to put in any defense, "as the court is without jurisdiction." The court thereupon found the issues for the plaintiff and entered judgment in his favor.

In support of his appeal, the sole contention of the defendant is that the trial court erred in denying his petition for a change of venue.

The statute provides, (Cahill's Ill. State. ch. 146, par. 5) that an application for a change of venue "may be made to the court in which the case is pending in term time, or to the judge thereof in vacation, reasonable notice thereof having been given to the adverse party or his attorney." The following paragraph of the statute (par. 6) provides that no application for a change of venue shall be allowed after the first term, except upon the giving of ten days notice to the opposite party, except where the causes have arisen or come to the knowledge of the applicant within less than that period of time before the making of the application. In the case at bar the defendant alleged that the prejudice of the trial court first came to his knowledge on the day previous to the making of his application for a change of venue. In our opinion, that situation called for "reasonable notice" of theapplication being given to the plaintiff. It is not pretended that any notice was given in this case. That being so, we are of the opinion that the trial court cannot be said to have abused his discretion, in denying the petition. Miller v. Pence, 138 Ill. 149; Hutson v. Wood, 263 Ill. 376; Noll, Admrx. v. Springfield Consolidated Ry. Co., 335 Ill. App. 411.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

318 - 30071

ANTON LAGATUTTE, a minor, by CONCIETTINA LAGATUTTE, his next friend,

Appellee,

v.

CHICAGO DAILY NEWS CO., a corporation,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

239 I.A. 675

Opinion filed Dec. 23, 1925.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant corporation seeks to reverse a judgment for $35,000, recovered against it by the plaintiff in the Superior Court of Cook County. The plaintiff brought this action to recover damages resulting from injuries received by him, which were alleged to have been caused by the defendant's negligence. The defendant is the owner of a building located on the northeast corner of Wells street and Madison street, in the City of Chicago. Part of this building is occupied by the defendant in conducting its business in publishing a newspaper. Another part of the building is occupied entirely by the defendant's tenants. This is the part of the building located at the corner of the two streets named. It is rectangular in shape, being about 80 feet north and south along Wells street, and about 60 feet east and west along Madison street. The other part of the building, occupied by the defendant itself, extends around this rectangular part, having frontage on both

Opinion filed Dec. 23, 1885.

Madison and Wells streets. The part of the building occupied by the defendant's tenants is five stories high. The entrance to that part of the building is at 7 North Wells street. This entrance into the portion of the building occupied by the defendant's tenants, leads into a small hall about six feet wide from north to south and three and a half feet deep from the door leading from the street, on the west, to the east side of the hall where an elevator is located, which serves all the floors occupied by the defendants tenants. This elevator extends almost across the width of the hall, the elevator platform being five and one half feet in width from north to south. The elevator platform is 5 feet 9 inches from east to west. There is a heavy wire mesh extending across the east side of the hall, from north to south, separating the hall from the elevator shaft. The south 3 feet, 4 inches, of this wire mesh constitutes the elevator door leading from the hall into the elevator. Although the entrance into the elevator from the hall on the ground floor is on the west side of the elevator, all exits from the elevator to the upper floors, where the tenants are located, are on the east side of the elevator. The elevator is operated by a cable which passes through the elevator at its southeast corner. There is a distance of 15 feet from the ground floor of this building up to the next floor, and as the elevator moves up through that distance, there is a space of about 15 inches between the west side of the elevator and the west wall of the elevator shaft. The west side of the car, as well as the east side, are entirely open but there is a heavy wire mesh which makes up the north

up the north

and south sides of the elevator. From the first floor above the ground floor to the top of the elevator shaft, this space between the west edge of the floor of the elevator car and the west wall of the elevator shaft, is only about half an inch. At the first floor above the ground floor, projection of the west wall of the elevator shaft out into the shaft space of about 14 inches is an abrupt horizontal projection.

For some years prior to the happening of the occurrence in question, one Carlson had been a tenant occupying the fourth floor of this building. He was engaged in the tailoring business. He had sublet part of his space to one Williams, who was also in the tailoring business. For about six months the plaintiff had been in the employ of Williams, as an errand boy. He was within four days of being 15 years old at the time he received his injuries, and was in the eighth grade of the public schools. He worked for Williams on Saturday mornings and from three to five o'clock on the afternoons of the other days of the week. In connection with his employment, he had occasion to go up and down in this elevator several times a day.

On the day in question he was one of two passengers in the elevator, and as the car was going up from the ground floor his right heel was caught between the floor of the elevator and the horizontal projection of the west wall of the elevator shaft at the point opposite the second floor. The plaintiff cried out that his foot was caught and the

operator of the car stopped it as quickly as possible and then lowered it a sufficient distance to extricate the plaintiff. The car was then lowered to the ground floor and the plaintiff was taken to the County Hospital, where he remained a day. He was then taken to the Columbus Hospital where he remained three months. The accident happened January 22, 1923. The doctor who took care of the plaintiff testified that he found bruises on the leg and wounds on both the top and bottom of the right foot, which wounds extended through the skin and flesh to the bones, and the heel was almost torn off. He said that it was not a clean wound and that they first put on wet dressings and gave the patient an injection of anti-tetanic serum. The plaintiff seemed to progress well until January 31, when several layers of gangrenous tissue were removed, and the doctor testified that on February 22, septic endocarditis, due to the absorption of the poisonous material, developed, and they then amputated the leg at the upper middle third. This doctor further testified that the patient did not give any evidence of the presence of endocarditis when first examined. He said that condition might be cured. He also testified that when he examined the plaintiff on May 19, 1923, the condition was still present. This doctor made another examination at the time of the trial and found he still had what was described as a pre-systolic murmer, caused by a narrowing of the mitral valve of the heart, and he said he was unable to say whether that was a permanent or temporary condition.

The declaration filed by the plaintiff consisted

of two counts, one based on a general charge of negligence and another based on the alleged violation of an ordinance of the City of Chicago, providing that "The under side of the floors or other parts of a building which project into passenger elevator shafts shall be equipped with a smooth steel guard, curved and sloped from the enclosure of said elevator to the edge of such projection for the width of the door of such elevator car, and the slope of the guard plate shall not be less than 60 degrees from the horizontal." The defendant filed a plea of the general issue.

The first contention made by the defendant in support of its appeal is that the trial court erred in not directing a verdict for the defendant at the conclusion of the plaintiff's evidence, and at the conclusion of all the evidence, because the plaintiff was guilty of contributory negligence, as a matter of law. There were only three witnesses to this accident, the plaintiff, the other passenger and the defendant's employee who was operating the elevator. The plaintiff testified that he had worked for Williams for about six months as an errand boy and that Williams had twenty employees working for him on the fourth floor. When the plaintiff stepped into the elevator, the operator and the other passenger were there. The plaintiff testified that he got on to the elevator from the west side and stood facing the east side, standing close to the wire mesh on the south side, and that he had hold of this wire mesh with his right hand and was resting, with the greater part of his weight on his left foot, and as he leaned up against the south side of the elevator, holding on to the

wire mesh, "my right foot was out a little bit * * * and as soon as I got past that ledge that comes out into the elevator shaft, my heel was caught and I hollered to the elevator operator to stop the car * * * The elevator and the projection sticking out of the elevator shaft caught my foot. * * * The heel was out a little bit * * * My heel was up like this, (indicating) and as soon as we are coming up to that projection, my heel got caught and pushed it down towards my toe and crushed the toe and heel together." He testified that he had an eight inch stump below his right knee. At the time of the trial he was wearing an artificial leg which extended up beyond the knee. He was also wearing a corset on the thigh above the artificial leg, which corset was made of leather and laced on, and he had a strap two inches wide extending over his shoulder. On cross-examination he testified that when he entered the car on the ground floor he was facing east and would ordinarily stand in that position as the car went up; that he knew that both the east and west sides of the car were open and the north and south sides were enclosed. He said that when he was coming down in the car he would enter from the east and usually stand in the car facing west as the elevator came down and that, as the elevator went up and down, he had a plain view of the east and west walls of the shaft; that he never noticed this projection that caught his heel. He was asked if it was in plain view every time he went up and down in this elevator and he said it was, and he was then asked if there was anything to prevent him from "seeing this was sticking out there as you rode up and down," and he said there was not. He was asked, "it was in plain view if you looked?" and he answered,

"I never looked; I never noticed it," and again he admitted that it was in plain view if he had looked. He also testified that there was a light in the center of the top of the elevator car, which illuminated the sides of the car and the walls of the shaft as the elevator moved up and down. He admitted further, on cross-examination that he knew the elevator "didn't have any back" and that if he stuck his foot over the edge he would get hurt, and he added, "but I never stood at the edge." He testified that there was nothing to prevent his standing near the center of the elevator. He was also asked when he first stuck his heel over the west edge of the elevator, and he answered, "I didn't know I stuck my foot out."

The other passenger in the elevator car, called as a witness by the plaintiff, testified that he was a tenant of the defendant, occupying the fifth floor, and that upon the occasion in question he was standing on the north side of the elevator, facing east, close to the west edge, and that the plaintiff stood to his right, "facing east, the same as I was." He said the plaintiff had some kind of a black bag in his hand. On cross-examination this witness testified he was standing about 10 inches east of the west edge of the elevator floor and the plaintiff was standing to his right, "a trifle west of me, - I would say about five or six inches west of me, because the bag he was carrying was about level with me." This witness also testified that as one traveled up and down in the elevator "you could see how far the west side of the elevator shaft was from the west side of the car. * * * you could see the ledge project-

ing into the elevator shaft." He also testified, "When people got on the car at the ground floor to go up on the elevator they would be facing east. They would ride up and get off facing east. When anyone got on the elevator above the ground floor to come down they would walk into the car facing west. They would stand there and face the west as the car went down, and when the car reached the ground floor you walked west out of the car."

The defendant's employee who operated the car, also called as a witness by the plaintiff, testified that the elevator car was about 6 feet square and was controlled by a cable.. He described the construction of the car and the conditions surrounding the entrance hallway on the ground floor and the walls of the elevator shaft. He then testified that in operating the elevator, after closing the door at the ground floor, he would walk over to the southeast corner of the elevator and (facing east) pull the cable and the car would move upward. He testified that on the occasion in question, one passenger entered the car and stood on the north side "about one foot east of the west edge of the elevator platform," and then the plaintiff came into the car, "and stood directly back of me," and about 3 feet south of the other passenger. He said the plaintiff was standing about 10 inches east of the edge of the elevator platform. He also testified that he knew the plaintiff had been traveling up and down in the elevator for at least two or three months before the day he was injured, and that he would make three, four or five trips

each day.

As a rule the questions of whether the defendant was guilty of the negligence charged, or whether the plaintiff was guilty of contributory negligence, present questions of fact for the determination of the jury, but where the facts are undisputed, and, in the opinion of the court, all reasonable minds would agree that the defendant was not negligent or that the plaintiff's injury was caused by his own negligence, the court may give the jury a peremptory instruction to find the issues for the defendant. It is not contended in this court, either that the trial court erred in submitting the question of the defendant's negligence to the jury or that the finding on that issue by the jury was not supported by the evidence. But it is contended that all reasonable minds would agree, on the uncontradicted facts shown by the evidence, that the plaintiff was guilty of contributory negligence and therefore the trial court erred in overruling the motions submitted by the defendant, requesting the giving of a peremptory instruction, directing the jury to find it not guilty.

It would be impossible, within the reasonable limits of an opinion, to analyze or comment upon the many cases which counsel have called to our attention on this point. One of the leading cases cited by the defendant in support of its contention that the plaintiff in the case at bar was guilty of contributory negligence as a matter of law, is Beidler v. Branshaw, 200 Ill. 435, in which the Supreme Court, reversing the judgments of the trial court and of this court,

held that the plaintiff's intestate was guilty of contributory negligence, as a matter of law, and that the trial court should have instructed the jury accordingly. The facts involved in that case, relating to the circumstances surrounding the injury complained of, were very similar to the facts presented in the case at bar. But in that case the Supreme Court pointed out that the deceased was a man of mature years; had been employed about the building where he was injured, for a year; and that he had had occasion to use the elevator repeatedly "and from the nature of things must have known the manner in which the elevator shaft was constructed, and that the car came very near to the lintel over the lower window on the north side of the shaft as it passed up and down, and that there was no railing or guard on the car on the north and west sides, and fully appreciated the fact that if any part of his person projected over the north edge of the car, the portion thus projecting would be liable to be caught between the car and the lintel as the car passed the window on its ascent and he be injured."

While the person injured in the Beidler case was "a man of mature years," the plaintiff in the case at bar was a boy who was within a few days of being fifteen years old, at the time he was injured. The law does not charge a fifteen year old boy with the same appreciation of danger in a given situation as it does one of mature years, nor require that he should necessarily exercise the same degree of care and caution as such a person, but only such care and caution as persons of his age and discretion would ordinarily use under similar circumstances.

But the defendant contends that it should be presumed that a minor fourteen years of age or over, has sufficient capacity and discretion and understanding to be sensible of danger and have power to avoid it, citing in support of that contention, a number of authorities, and, among them, the recent decision of our Supreme Court in Maskaliunas v. C & N. I. R. R. Co., 318 Ill. 142. That case involved a boy seven years old. The court did say in the course of its opinion in that case, "We have also held that when a child has attained the age of fourteen years, there is no reason to excuse him from the same degree of care for his own safety which is required of an adult. Austin v. Public Service Co., 289 Ill. 113; Walldren Express Co. v. Krug, 291 Ill. 472. Chicago and Alton R. R. Co. v. Becker, 76 Ill. 25." In Austin v. Public Service Co., 289 Ill. 113, the Supreme Court held that a boy, within ten days of being fourteen years old, was guilty of contributory negligence, as a matter of law, under the facts there presented. In the course of its opinion in that case, the court said, "To walk erect on top of an iron beam 14 inches wide, over a rapidly flowing river 34 feet below, is certainly dangerous, and persons exercising common prudence must be held to appreciate the danger. A boy fourteen years old, who has been raised in a city, knows as well as a man, that insulated wires carried upon poles are likely to be charged with a deadly load of electricity and that it is not safe to touch them or go where he is likely to fall into them." In the case of Walldren Express Co. v. Krug, 291 Ill. 472, the Supreme Court held that the question of whether the plaintiff, a boy just under fifteen years of age, was guilty of contributory

negligence, as alleged, was immaterial, as the evidence was such as to require the submission of the question of whether the defendant was guilty of wanton negligence, to the jury. In the course of its opinion in that case, the court said, "The defendant in error was old enough to know, and the evidence shows that he did know, the character of the traffic in Thomas street, the danger from automobiles and other vehicles, and there is no reason to excuse him from the same degree of care for his own safety which is required of an adult." In C. & A. R. R. Co. v. Hecker, 76 Ill. 35, it was held that, where the plaintiff, a boy of six or seven years of age, was killed by the defendant's train, when he, with two boy companions, attempted to run across the track ahead of the train when it was approaching only sixty feet away, at a speed which was usual and proper, the whistle having been sounded at the proper place and the bell being rung continuously and the boy stumbled and fell upon the track and those in charge of the train made every effort to stop it, a recovery by the plaintiff administrator could not be sustained. The court did not say, however, that the deceased was guilty of contributory negligence as a matter of law, but in remanding the cause for a new trial because of the giving of an erroneous instruction on the subject, the court said that "the age, the capacity and discretion of the deceasedtto observe and avoid danger were questions of fact to be determined by the jury, and his responsibility was to be measured by the degree of capacity he was found to possess." The court also said in that case, that, in considering the question of the capacity

of children for observing and avoiding danger, with reference to contributory negligence on the part of the child injured, it was "obvious that no definite rule of law can be laid down which should interfere with the jury judging each case on its own merits and by its particular circumstances. If the child, from its age and experience, be found to have capacity and discretion to observe and avoid danger, it should be held responsible for the exercise of such measure of capacity and discretion as it possesses." The court then said that the question presented was similar to the question of whether an infant, under the age of fourteen years, was capable of committing a crime, with which he had been charged in a criminal proceeding, and, in that connection, the court observed that "on the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society, for the law presumes them at those years to be doli capaces, and able to discern between good and evil." The court then said, "But there is no inflexible rule which governs, where the question arises in civil cases whether contributory negligence is imputable. As stated above, it is in each case a question for the jury, to be determined upon the particular circumstances in evidence." Since the decision of that case it has been repeatedly held that contributory negligence may not be imputed, in any case, to a child under the age of seven years.

In the Maskaliunas case, in which the three cases last above referred to are cited, the Supreme Court held that the question of whether a boy seven years and ten months of

age, who had been injured when attempting to board a moving freight train, was guilty of contributory negligence, had been properly left to the jury to determine as a question of fact. In the course of its opinion in that case the court included the sentence relied upon by the defendant in the case at bar, to which reference has been made. The court also said in that case, that "since, in reason, responsibility for one's acts depends upon the understanding rather than the age, there can be no fixed rule of age which will operate justly in every case," but that an "imperfect rule is better than none" and therefore "while there has been some slight deviation in a few cases in the application of the rule by this court, it is fairly well established * * * that a child under seven years of age is conclusively presumed incapable of contributory negligence, and that in the case of a child above the age of fourteen years, the same rule shall be applied to him in that regard as is applied to adults, his intelligence and experience being considered." The child, whose contributory negligence was involved in that case, was neither under seven nor above the age of fourteen years but, as stated, was seven years and ten months old, when injured.

Another case urged upon our attention by the defendant is Western Union Telegraph Co. v. Gilleran, 136 Ill. App. 429, where a boy eighteen years old had his foot crushed in an elevator accident, the circumstances of which were very similar to those presented here. There are vital points of difference in the two cases, however. The Western Union case was a master and servant case. There, the eighteen

year old boy who was injured had piled some bales of excelsior on the floor of a freight elevator, leaving standing room between the bales and the front of the elevator which was unprotected. As he, with several fellow employees who were engaged in the matter, was going up on the elevator he stood facing the bales with his back to the front of the elevator, and his arms on top of the bales, while his fellow employees stood facing the other way. As the elevator passed the second floor, plaintiff's heel was caught between the elevator platform and the floor and he sustained the injuries there complained of. As the elevator approached the second floor, another employee reached in and struck the plaintiff. Whether he stood still or moved was disputed. The court held that even if the space in which the plaintiff was standing was so scant as to make its use dangerous, that condition could not be charged to the defendant, for the situation had been created by the plaintiff himself, and the defendant had no knowledge of it. The court then pointed out that the fact that the elevator had no gate or other protection was apparent and the plaintiff must be held to know that which was apparent at a glance, citing McCormick Machine Co. v. Zakszewski, 230 Ill. 522, and C. I. & L. Ry. Co. v. Barr, 204 Ill. 163, in both of which recovery by a plaintiff, who was an employee, was barred on the doctrine of assumed risk.

It may well be that "a boy between thirteen and fourteen years of age knows as well as a man that a pond * * * is not a safe place to go when the ice is broken at the edge and covered with water, and if, with the knowledge of such danger, he carelessly and recklessly goes upon such

pond and loses his life, his age cannot excuse him," Heimann v. Kinnare, 190 Ill. 156; or that a fifteen year old boy, is old enough to appreciate the danger of playing ball out in the middle of a street where automobiles and trucks may come along at any moment, and, if he nevertheless does play in such a street, "there is no reason to excuse him from the same degree of care for his own safety, that is required of an adult," Baldwin Express Co. v. Krug, 291 Ill. 473; or that a thirteen year old boy "was old enough to know, and his experience in life was sufficiently broad to convince us that he did know, the danger attending the hazardous act of walking upright on a beam 14 inches wide and 34 feet above a rapidly flowing river, and there is no reason for excusing him from the same degree of care for his own safety, which is required of an adult," Austin v. Public Service Company, 299 Ill. 113; or that a fifteen year old boy, who lost a thumb by having it caught and crushed between the cage and elevator wall of a building, when he deliberately stuck his hand through a hole in the iron grill or scroll work at the back of theelevator, after being admonished by another passenger that his hand would be hurt, may properly be considered guilty of contributory negligence as a matter of fact, Western Union Telegraph Co. v. Woods, 88 Ill. App. 375; or that children of different ages, who are shown to have been careless or negligent under given circumstances, should be held to have been guilty of contributory negligence as a matter of law, as might be illustrated by reference to many cases where that question has been passed upon, but it by no means necessarily follows that such should be the ruling in the case at bar, where a boy, practically

fifteen years of age, enters an elevator in a building, where the arrangement and construction is such, that the usual and customary position of passengers, as they go up in the elevator, is one facing the door of exit, which, however, places them with their backs to an unprotected side of the elevator, which exposes them to danger, and where that boy stands in that manner about a foot from the unprotected side, and leans against a protected side of the elevator with his weight on the opposite foot, and with the other foot makes a natural and involuntary movement, resting the toe of his shoe on the elevator floor, but gets it farther back than he realizes and thus projects his heel far enough beyond the edge of thefloor to be caught by a horizontal projection into the elevator shaft and thus suffers the injuries complained of, even though he knew that he would get hurt if he stuck his foot over the edge.

Each of the following cases involved an elevator accident, similar to the one we have to deal with in the case at bar. While these cases are not similar in all details to the case under consideration, they are, in our opinion, not materially different, either in the substantial facts involved or in the issues presented, except as noted. Some of them were master and servant cases, presenting the question of assumed risk, as well as the question of contributory negligence. Such was the case of Siegel & Cooper & Co. v. Treka, 218 Ill. 558, in which our Supreme Court said, "In view of appellee's age, (fourteen years) and the rules of law governing the questions of contributory negligence and assumption of risk in case of minors, it was proper that these questions should be submitted to the jury for its determination."

In the case of Obermeyer v. F.H. Lorenman Chair Mfg. Co., 329 Mo. 97, the court said, "A man, in respondent's situation, would perhaps have noticed that the elevator was near a floor and would have remembered the danger of having his foot caught should he throw it back; but, whether a fourteen year old boy should so closely observe and exercise such a degree of prudence, we think, was a question for the jury."

The case of Martin v. Kline Apparel Co., 349 S.W. 965, involved a boy sixteen years of age who was an elevator operator. In that case the court said, "Although the parts of the appliance and their physical relation to each other and to the surrounding objects may have been plainly discernible, yet, unless the dangers attending the use of the appliance were likewise obvious to one of his understanding, plaintiff cannot be convicted of contributory negligence. Ordinarily, it is a question of fact, and not one of law, whether, considering his age, experience and intelligence, the employee did understand and appreciate, or ought to have understood and appreciated, the danger to which he was subjected."

The case of Citizen's Bank v. Fairweather, 127 Ark. 63, involved a boy fourteen years of age. The court pointed out that the plaintiff had testified that "there was enough light for him to see, and that if he had looked he could have seen that his foot would strike the beams of the floors, but we think it was a question for the jury, under all the circumstances, to determine whether the boy was of sufficient discretion and intelligence to appreciate the danger so as to be held to have assumed the risk." The court held that it

could not be held as a matter of law, either that he had assumed the risk or was guilty of contributory negligence.

The case of Strawbridge v. Bradford, 128 Pa. St. 200, involved a boy thirteen years of age. In that case it was charged that the plaintiff had been guilty of contributory negligence and it was urged that the trial court should have given a peremptory instruction for the defendant. With regard to that contention the court said, "It must be borne in mind that this plaintiff had not attained the age when sufficient capacity to be sensible of danger and to avoid it is presumed. A boy's capacity is the measure of his responsibility, and if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to it. * * * When an infant who has not reached the age of discretion is charged with concurrent negligence it becomes important to inquire if he had sufficient understanding to comprehend and guard against the peril he was in, and this matter is ordinarily to be considered by the jury in connection with the other circumstances of the case, and under proper instructions from the court. * * * We are of the opinion that the question of the alleged contributory negligence of the plaintiff was not a question of law for the court, but of fact for the jury. * * *"

The case of Otis Elevator Co. v. Mann, 191 Fed. 756, involved a boy sixteen years of age. In the course of its opinion the court observed that "the degree of care required of a boy of 16 may not be the same as that required of an adult. The question was one for the jury to determine on all

the circumstances of the case, of which the boy's age was one."

In the case of National Life Insurance Co. v. McKenna, 226 Fed. 165, which involved a boy whose age is stated in the opinion to have been 13 or 14 years, the boy testified that he appreciated the fact "that if I got beyond the cage, I would get hurt by getting caught." He admitted that if he had been paying attention he would not have had his foot caught and that he got hurt because he was not giving attention to the question of where he was stepping. Admissions of a similar nature are to be found in the cross-examination of the plaintiff in the case at bar. In the case cited the court said, "Admissions of this kind, found in the cross-examination, must, of course, be taken in connection with the other facts of the case as disclosed by the proof." The court then pointed out that the proof showed that a boy who was a passenger on the elevator, saw the operator reach out his hand, supposedly, to open the door through which the boy was to pass. As the operator made this motion, the elevator slowed down and stopped. When the boy observed this motion, he stepped forward from the point wherehe had stood, near the middle of the car, to a point near the door, but stepped too far, and as the elevator suddenly started up again, it caught his foot between the elevator platform and the edge of one of the floors of thebuilding. The court then said, "The boy * * * had sense enough and did realize that if he stepped too far and at the wrong time he would get hurt. He knew the facts, and appreciated the possible danger if he failed

the circumstances of the case, of which the Jury's ego was one."

In the case of _Bullard_ [illegible] _Fox_ [illegible] _Reports_ 668 Fed. 158, which involved a dog whose bite is stated in the opinion to have been 15 of 16 years, the Jury stated that in explanation the fact "that if I got beyond the dog, I would get hurt by getting scraps." He admitted that if he had been paying attention he could not have had the time enough and that he just happened to see and giving attention to the question of where he was standing. Admissions of a similar nature are to be found in the cross-examination of the plaintiff in the case at bar. In the case cited the court said, "Admissions of this kind, found in the cross-examination, must, of course, be taken in connection with the other facts of the case as disclosed by the record." The court then pointed out that the record showed that a boy who was a passenger on the other vehicle, saw the car, put [illegible] and his hand, consequently, he opens the door through which the boy was to pass. As the car moved this motion, the elevator slowed down and stopped. When the boy observed this motion, he stepped forward from the point therein had stood, near the middle of the car, to a point near the door, but stepped the [illegible] on the elevator suddenly started up again, it caught his foot between the elevator platform and the edge of one of the floors of [illegible]. The Jury then said, "The boy [illegible] and knew enough and did realize that it be stepped [illegible] the car and at the moment when he would get hurt. He knew

to act cautiously. Was the plaintiff, in taking this step towards alighting in these circumstances, guilty of contributory negligence? * * * Our common experience teaches us that very prudent persons often take some chances, and risks, even if they know the facts and appreciate the risk they are taking. The controlling question is not whether plaintiff knew or appreciated that it was dangerous to do as he did, but is whether an ordinarily prudent person under such circumstances would have refrained from doing as he did." It was contended in that case that the plaintiff should be held to the consequences of contributory negligence, because he knew and appreciated the risk and danger attending what he was about to do, and nevertheless did it. The court then referred to the case of Mosheuvel v. District of Columbia, 191 U.S. 347, in which a similar contention had been advanced, as to which the court there said that the result of admitting such a doctrine "would be to hold that all persons in making use of the public streets assumed all risks possibly to arise from every known defect or danger," and would be guilty if an injury was suffered by them as a result of such defect or danger, of contributory negligence.

The case of Wise v. Ackerman, 76 Md. 375, involved a boy 14 years and 7 months of age, the circumstances of whose injury were very similar to those involved in the case at bar. The court held that the trial court was warranted in denying the defendant's motion to take the case from the jury. Judgments for the plaintiff were affirmed in Quimby v. Bee Building Co., 87 Nebr. 193, involving a boy 13 years

old, and in Rosenberg v. Schoolherr, 101 N.Y. Suppl. 505, affirmed in 197 N.Y. 523, involving a boy 17 years of age, in both of which the plaintiffs were injured by reason of inadvertently permitting a foot, in the first case, to extend beyond the edge of theelevator platform; and in the second case to protrude through a hole in the side of the elevator wall.

We are of the opinion that,under all the facts and circumstances proved in this case,it may not reasonably be held, either that the plaintiff was of such age, intelligence and experience that he should be charged with the same degree of appreciation of the danger involved in the circumstances he was placed in, or the same degree of care for his own safety, that would be charged to an adult, or that his conduct under those circumstances should be held to amount to contributory negligence as a matter of law. Those questions wereproperly treated by the trial court as questions of fact to be submitted to the jury for their consideration and determination.

In support of its appeal the defendant makes the further contention that Williams, the employer of the plaintiff, was occupying the defendant's premises in violation of the provisions of a written lease, between the defendant and Carlson, and for that reason the defendant had violated no duty which it owed to the plaintiff or his employer, and thisbeing so, the trial court erred in denying the defendant's motions for a directed verdict, at the conclusion of the plaintiff's case and at the conclusion of all the evidence. The proof shows that at thetime the

plaintiff was injured, a written lease was in existence between the defendant and Carlson, covering the entire fourth floor in question, and this lease contained a provision in which Carlson agreed not to allow the premises to be occupied, in whole or in part, by any other person, and not to sub-let the premises or any part of them or assign his lease, without in each case, first obtaining the written consent of the defendant. Counsel for the plaintiff urge several matters in reply tothis contention of the defendant, but in our view of the case it will be necessary to consider only one of them, which is that the defendant had notice, through its agent, long prior to the date of the plaintiff's injury, that Williams was occupying a part of the floor which was leased to Carlson, paying the rent therefor to Carlson, and, having this knowledge, nevertheless permitted the status to continue, and that being so, the defendant itself must be deemed to have had such knowledge and to have permitted the situation to continue, and, therefore, the defendant must be held to have waived the covenant in its lease, to which reference has been made. The defendant urges further in this connection that Wilson & Company, who were the agents of the defendant, having charge of this building, did not have authority to change, modify or waive any of the provisions of the written lease; that an agent to rent premises and to collect rents, has no power to consent to the substitution of a new tenant nor to alter or vary the terms of the original lease; and that the knowledge of an agent cannot be imputed to a principal, unless such knowledge relates to such matters as are within the scope of the agency. While that is a correct statement of the law, we are

of the opinion that the evidence in the record fails to bear out this contention of the defendant, for Walter H. Wilson, the senior member of the company, testified that he was the general agent of the defendant for this building, in full control of the building, "with power to lease and sublease and make arrangements with the tenants." Such being the power of the agent, if the proof shows he had knowledge of the sub-tenancy, and nevertheless permitted it to continue, such knowledge and action must be imputed to the defendant. The question of whether Wilson & Company did have knowledge of the sub-tenancy of Williams, is the subject of conflicting testimony. It was therefore one of the issues properly submitted to the jury in determining the alleged guilt of the defendant of the alleged negligence charged in the declaration. It is conceded by the defendant that no question concerning the extent of the legal duty owed by it to the plaintiff, is involved on this appeal, unless this court can say that the verdict of the jury is against the manifest weight of the evidence on the question of whether the defendant did have notice of the sub-tenancy of Williams.

On that issue, Williams was called as a witness by the plaintiff and testified that he had been conducting his business as a tailor, occupying a part of the fourth floor of this building as a sub-tenant of Carlson, for about seven years prior to the date of the plaintiff's injury, employing an average of 10 people and sometimes as many as 15 people. He testified that he paid his rent to Carlson; that formerly the representative of Wilson & Company, who handled the collec-

tion of rents from Carlson, was one Babcock, but that later these collections were made by one Johnson. On cross-examination Williams testified that at the time he subleased the portion of the premises he occupied, from Carlson, he did not consult the Daily News Company nor Wilson & Company, but made his arrangement with Carlson. The evidence shows that the fourth floor was entirely open and unobstructed by partitions, with the exception of a small space used as an office by Carlson; that both Carlson and Williams were in the tailoring business, each of them operating a number of machines in connection with their business, and that the portion of the space used by Williams was at the north end of the room, the entire room being about 80 feet wide and 80 feet long. Further, on cross-examination, Williams testified that at one time there was a sign about two feet square across the entrance door to these premises, with his name on it, and that this card was first put up about four years prior to the time he was testifying, and it was taken down in July, 1922, when a re-arrangement of the space was made under which the defendant took over about 500 square feet of the space at the north end of the floor, at which time "there was some partitions changed there and the cards were taken down." On redirect examination, Williams testified that he was frequently present at the time Johnson called to collect the rent from Carlson, and that at one time he discussed with Johnson the question of taking the lease of the premises held by Carlson, himself, and that he had also talked with Johnson about certain repairs.

For the defendant, Walter H. Wilson testified that he was the agent of the defendant, having control of the pre-

mises in question and that he had been such for 10 or 12 years prior to the date of the plaintiff's injury; that generally, in leasing the premises, his firm used their own judgment; that at the time of the plaintiff's injury, Johnson, who was practically a member of the firm, had charge of the premises. Wilson further testified that prior to the injury of the plaintiff he had no notice or knowledge of the fact that Carlson was permitting Williams to occupy a portion of the premises, under either a sub-lease or an assignment. On cross-examination, Wilson was asked whether he meant, by his direct testimony, that he, as the defendant's agent, had no personal knowledge of Williams' sub-tenancy or whether he meant he had no knowledge, either personal or through the employees of his firm, and he answered, "I can't say as to that * * * I have seen Mr. Williams in the office occasionally, - my office,- I didn't know for quite a while what he was therefor. He was talking to Mr. Johnson * * * I saw him there two or three times, perhaps." Wilson was asked on cross-examination what he would have done about the matter if he had known, prior to the plaintiff's injury, that Williams was occupying a part of the premises and that Carlson had sub-let the space for the purpose of helping meet his rent, and he answered, without objection, that that was a hard question to answer "because Mr. Carlson was occasionally slow in his rent, but we got it." It appears from the evidence that Carlson's lease was cancelled just a year subsequent to the time of the plaintiff's injury, namely, in January 1924, and at that time a new lease was executed by the defendant to Carlson for the portion of the space he was occupying, and a separate

lease was executed by the defendant to Williams, for the portion he occupied. Wilson testified that he did not find out that Williams was in the premises as a sub-tenant until these new leases were executed in January 1924.

Carlson, called as a witness by the defendant, testified to the effect that he did not "get the consent of any officer of the Chicago Daily News Company" nor "have the consent of Wilson, the Agent," to sub-let or permit Williams to occupy a portion of the premises. On cross-examination he testified that Williams had been occupying his part of the premises since the spring of 1919. Carlson was asked by the court whether at or about the time he entered into his last lease with the defendant, he had any talk with anyone about Williams being there as a sub-tenant, and he said that to the best of his knowledge or recollection, he thought he did have such a talk with Babcock, who, the proof shows was at that time connected with Wilson & Company in the same capacity that Johnson was later connected with that concern. In further response to this inquiry Carlson testified that "in a general way, I spoke to Mr. Babcock that I had a tenant, Mr. Williams." During the cross-examination of Carlson he was asked by counsel for the plaintiff, "During all this time was there any conversation in which the subject of William's standing there has been discussed in any way, as to whether he was a sub-tenant?" To that question Carlson replied, "I have in the same way as to Mr. Babcock. I am positive I have been speaking to Mr. Johnson, but it was in a general way that he leased out part of that floor."

Johnson, called as a witness by the defendant, testified that he had been connected with Wilson & Company since January 1931, two years prior to the time of the plaintiff's injury. He testified further that he had no knowledge or information or notice prior to the time the plaintiff was injured, that Carlson was sub-leasing a part of his premises to Williams or permitting Williams to occupy any part of the premises. Johnson was asked by counsel for the defendant whether Carlson ever consulted him or requested his permission to sub-let any part of the premises leased by him to Williams and his answer was, "I never had any business connections with Mr. Williams." He testified that he did not recall ever seeing William's name on the door.

With reference to the cancellation of Carlson's lease, a year after the plaintiff was injured, it is the defendant's argument that no knowledge of the fact that Carlson had sub-let any part of his premises to Williams, came to it or its agents until about that time, and that as soon as such knowledge did come to it, his lease was cancelled; and the contention is that this action was taken by reason of the fact that the defendant took the position that this was a violation of one of the express provisions of Carlson's lease, and it was therefore cancelled because of such violation. In our opinion the record tends quite strongly to show that the real reason why Carlson's lease was cancelled for the entire space, was the fact that the defendant was having trouble collecting the rent for all that space from Carlson. On this point, Johnson, the defendant's witness, was asked what was the occasion of his cancelling Carlson's lease, and he answered,

"Why, Herman Carlson proved to be a tenant that became delinquent in rent, he was behind two or three months, and I went up to see him. * * * The occasion of my going to see Carlson was to find out why he could not pay his rent and to be courteous to him, to tell him that if he did not pay his rent I would have to sue for possession. We had a tenant for the premises, and that is the time he brought it out that Williams was a sub-tenant. * * * That was the first time I knew he was a sub-tenant of Carlson's." He testified that he then made his arrangement to receive from Williams, direct, his portion of the rent he was paying and he gave Williams a lease for the part of the premises he was occupying, and cancelled Carlson's lease for the entire space and gave him a new lease for the part of the premises he was occupying. Wilson's testimony contains an admission of the same sort, as to the reason for cancelling Carlson's lease in January 1934. He testified that it was cancelled "with the purpose of renting to other people," and then they gave a lease to Williams and one to Carlson for the respective portions of the premises they were occupying. As already pointed out, Wilson also testified that if he had known prior to the time of the plaintiff's injury that Williams was in the premises as a sub-tenant, it was difficult to say just what he would have done, - not because that was not in conformity with the provisions of Carlson's lease, but because Carlson was a tenant with whom they frequently had difficulty in getting payments due on the rent.

The witness Johnson testified further that he never had any dealings with Williams but that all of his dealings

were with Carlson. On cross-examination he testified that he frequently saw Williams in Carlson's premises but did not know whether he was a working man or "a part of Carlson's establishment there," - that Williams was always at work and did not appear to be in charge and that he never knew Williams had any employees there. He denied that he had ever had any talk with Williams concerning some repairs to be made in the premises, in which he had made any statement to the effect that he did not recognize a sub-tenant. He also denied that he had ever had any talk with Williams, in which he discussed the fact that Carlson was unable to pay his rent and asked Williams to take over the lease.

Babcock, called as a witness by the defendant, testified that he was a special partner in the firm of Wilson & Company for ten or twelve years prior to January 1933, a year before the time of the plaintiff's injury; that prior to that time he had entire charge of this property; that Carlson had been a tenant for some years under a written lease, and that he had never known of Carlson permitting Williams to occupy a part of his premises, and that he had no recollection of any sub-tenants in this property at all, and if there were any they were there without consent. He also testified that he had no recollection of any conversation with Carlson relating to the sub-letting of any part of these premises, and that he did not know Williams and as far as he knew he had never heard of him before. On cross-examination he testified that they had a great deal of trouble collecting the rent from Carlson and he frequently went to the premises for the purpose of collecting the rent.

The plaintiff re-called Williams as a witness in rebuttal and he testified that some time in January or February, 1931, two years before the time of the plaintiff's injury, he had a conversation with Johnson about some repairs in the building, in which Johnson made the statement that he did not recognize sub-tenants in this building. He further testified that sometime during the fall, prior to the time of the plaintiff's injury, he had another conversation with Johnson, in which Johnson asked him to take over the lease on these premises, because Carlson was unable to pay the rent. He further testified that during the month of July, prior to the plaintiff's injury, the defendant took over some space at the north end of the floor occupied by Carlson and himself, which involved the largest part of the space he was then occupying, and necessitated his moving further south on that floor and he had a conversation with Johnson on the subject, and they measured out the space, and after that Johnson asked him if that was enough space for him (Williams) "that we measured out, whether the walk between the two tables, Carlson's and mine, would be sufficiently wide enough, and little details concerning the moving of pipes, and different things like that." He also testified that he had been in Wilson's office five or six times with reference to paying the rent, and that when he went there he saw Mr. Wilson and on one occasion talked with him about some changes he wanted to make in the shop "and I didn't want to make them until I was positive whether Carlson would stay there, and there was some question about his lease being revoked. " * * Johnson

was talking to me about conditions there, that he had a hard time to collect the rent."

The defendant again called Johnson to the stand and he repeated some testimony he had already given in denial of the conversations Williams claimed to have had with him, and he testified that he never had any talk with anybody concerning the machines, except Carlson.

We are clearly of the opinion that on this conflicting evidence, it would be quite impossible for this court to say that the verdict involving the finding of the fact that the defendant, through, its duly authorized agents, had knowledge of the presence of Williams in these premises and of the relations existing between him and Carlson, was against the manifest weight of the evidence. The testimony submitted in behalf of the plaintiff shows that Wilson & Company did have that knowledge, through Babcock or Johnson or both, and while that is denied, parts of the testimony submitted by the defendant itself tends quite materially to corroborate the plaintiff's contention on this point. Johnson testified that he never had any business connections with Williams and that he never had any knowledge of the fact that Williams was in the premises under some arrangement with Carlson, as a sub-tenant, and that he never knew Williams was there in that capacity until Carlson divulged the fact in January 1924. At another point in his testimony Johnson stated that he never had any dealings with Williams and that although he saw him in Carlson's premises, he supposed he was one of Carlson's workmen. Williams, on the other hand, testified that he did have talks with Johnson about the rent

and about repairs; that he had been in the office of Wilson & Company, "perhaps five or six times," not on Carlson's business but on his own business. The testimony of defendant's own witness, Wilson, tends to corroborate Williams rather than Johnson, for he testified that he did see Williams in the office of Wilson & Company a number of times, and he added, "he was talking to Mr. Johnson." While Wilson testified that he had no knowledge himself as to the subtenancy of Williams, prior to the time of the plaintiff's injury, he gave testimony which intimated very strongly that that fact, in and of itself, would not have necessarily interfered with Williams' possession, if he had known of it, but that it would have been difficult for him to say just what course would have been pursued, the reason given being that Carlson was not very desirable from the standpoint of his payments. Wilson also testified that he could not say that it was correct that he had no knowledge that Williams was occupying a part of these premises until January 1934, and that he had seen Williams in his office a number of times talking with his partner, Johnson, and that he made no inquiry as to why he was there, "He was not a tenant of ours at that time."

The occupation of a portion of these premises by Williams was open and evident and it existed over a period of years. A similar issue was presented for consideration in Told v. Madison Building Co., 216 Ill. App. 29, where the evidence on the question was also conflicting. As in that case, so in the case at bar, we are of the opinion that it was for the jury to say, under all the facts and circumstances

shown by the evidence, whether the alleged sub-tenant was occupying the premises with the implied consent of the defendant. We are therefore of the opinion that the trial court did not err in denying the defendant's motion for a peremptory instruction on the theory contended for.

The defendant complains of the action of the trial court with regard to certain of the instructions. In one of the given instructions the court told the jury that the owner of a building owes persons who are on the premises by the invitation of the owner, either expressed or implied, the legal duty to exercise ordinary care for the safety of such persons. By this instruction the court further told the jury that what was meant by an implied invitation was that one was there for a purpose connected with the business in which the owner was engaged or which the owner permits to be carried on in the premises, "if any." This instruction further told the jury that if they found from a preponderance of the evidence that the employment of the plaintiff was unlawful, then they were further instructed that the act of a child in accepting and entering into such employment could not be unlawful so far as the child was concerned. While it is not erroneous to refuse to give an instruction which merely states an abstract proposition of law, the giving of such an instruction will not be considered erroneous if it is applicable to the facts involved and is not susceptible of being construed as an inferential statement of opinion by the court on the facts, and in our opinion, this instruction may not reasonably be said to be subject to that objection. It is urged that there was no proper evidence in the record from which it could

be inferred that the plaintiff was upon the defendant's elevator by its implied invitation. From what we have already stated in this opinion, it will be seen that we do not concur in that contention. It is further contended by the defendant that the giving of this instruction was erroneous because it ignores one of the important elements in the defendant's case, namely, that the plaintiff was not on the premises by either expressed or implied invitation of the defendant. The instruction was not open to that objection, because it does not purport to contain a complete recitation of the issues nor does it direct a verdict. In connection with this instruction, the defendant also complains of the action of the trial court in refusing to give an instruction which it tendered, which told the jury, as a matter of law, that the lease between the defendant and Carlson was a valid and binding contract between those parties and that the provision contained in it, prohibiting a sub-letting of any part of the premises or an assignment of the lease, without first obtaining the consent of the defendant, was a valid and binding provision, and that if Carlson permitted Williams to occupy part of the premises or sub-let such part to him without first obtaining the written consent of the defendant, then such act on the part of Carlson was in violation of the terms of the lease referred to and therefore was void and not binding on the defendant, and the occupancy of any part of the premises by Williams, prior to the date of the plaintiff's injury, was unlawful and Williams was a trespasser in the defendant's building and the plaintiff was a trespasser in the defendant's elevator

at the time of his injury. It seems quite clear that the action of the trial court in refusing that instruction was proper, because it by no means followed either that Williams was a trespasser or that the plaintiff was such, because a valid lease existed between the defendant and Carlson and contained the provision referred to. The reasons why that is so, have already been discussed.

The defendant further complains of the action of the trial court in giving two instructions submitted by the plaintiff, each of which contain a somewhat lengthy statement of the allegations which the plaintiff had made in his declaration, and closed with a statement to the effect that if the jury found from a preponderance of the evidence under the instructions of the court that the plaintiff had proven his case, as so alleged, then the jury should find the defendant guilty. Similar instructions have recently been approved by the Supreme Court in Liska v. Chicago Railways Co., 318 Ill. 570.

The defendant contends further that the trial court erred in refusing an instruction which it tendered, by which the court was requested to tell the jury if they believed from the evidence that the plaintiff knew, prior to and on the day of the accident, that the west side of the elevator was not enclosed, and that if he permitted his foot to project beyond the edge of the elevator platform, his foot would be injured, then the plaintiff could not recover. We are of the opinion that the trial court did not err in refusing to give that instruction. The reasons for that opinion appear

from statements we have already set forth in the course of this opinion.

The defendant also contends in support of its appeal that the damages which the jury awarded the plaintiff by its verdict are wholly excessive and manifestly out of proportion to the damages proven by him. In this connection numerous cases are cited, involving the question of whether the damages awarded by the juries in those cases were excessive in view of the injuries there complained of, and in many of which courts of review held that under all the facts there involved, the damages were excessive. Many of these cases were decided some years ago. We have already had occasion to observe on this question that such cases are of little value in passing upon this question now. This is apparent from the fact that in recent years the purchasing value of money has greatly depreciated, while most of the things that money buys, including not only comforts but necessities of life, have greatly appreciated, - each of those propositions, of course, involving the other to some extent. In connection with this question counsel for the defendant has called our attention to the case of Maskaliunas, by his next friend, v. Chicago & E. Indiana R.R. Co., Illinois Appellate Court, First District, case No. 28837, opinion filed December 24, 1924, not yet reported, in which case, a boy 8 years of age suffered an injury necessitating the amputation of a leg below the knee, where this court held that a judgment for $25,000 was not excessive. Counsel call our attention to the fact that in that case the suit of the plaintiff was by his father, as his next friend, and

in the course of that opinion it was stated that the judgment there involved, included not only the personal injury of the boy "but also whatever the father may have for the loss of the son's services during his minority, American Can Co. v. Hill, 236 Ill. 237; Chicago Screw Co. v. Weiss, 203 Ill. 536;" and counsel then argue that in the case at bar avery different situation is presented because plaintiff brought his suit by his mother, as his next friend, and the record contains no proof to the effect that the father is dead or why he was not the one to bring this action as the plaintiff's next friend. We do not consider that the fact that we held in the case cited that a judgment for $25,000 was not excessive, and the element of loss of the minor's services was there present and the minor there involved was some years younger than the plaintiff in the case at bar, is of any assistance one way or the other, in this case, although the damages awarded are higher and no element of the loss of the minor's services or ability to earn wages during his minority is here involved.

Our attention is called to the case of Foreman Brothers Banking Co., guardian v. Consumers Co., 236 Ill. App. 662, where a boy 15 years of age suffered an injury necessitating the amputation of his right leg below the knee, in which case, this court in October 1922, affirmed a judgment recovered by the plaintiff amounting to $25,000, but required a remittitur of $10,000. In the course of the opinion in that case the court said that while it is true the boy's physical activity was impaired on account of his injury, there was

nothing in the record to justify the conclusion that his earning power would be diminished thereby. In our opinion, there are many elements properly entering into the question of damages, not referred to by the court in that opinion. Our attention is also called to the case of Liska v. Chicago Rys. Co., 233 Ill. App. 628; 318 Ill. 570, where there was a verdict for the plaintiff fixing his damages at the sum of $25,000 which was reduced by a remittitur in the trial court to $17,000, judgment for that amount being affirmed in this court. In that case the plaintiff was a boy three years and five months of age, and his injuries resulted in a loss of his right leg, five inches below the knee. This court was not called upon to pass on the question of whether damages of $25,000 should be considered as excessive in that case. In Posch v. Chicago Railways Co., 221 Ill. App. 241, this court discussed this question citing cases. In 1891, a judgment for $35,000 for the loss of a leg, was sustained in Erhman v. Brooklyn City R. R. Co., 131 N.Y. 576, and in 1907, the Appellate Division in that state required the plaintiff to remit $10,000 from the judgment for $35,000 for the loss of a leg, in Meakes v. N.Y.C. & Hudson River R.R. Co., 106 N.Y. Suppl.522. The same court sustained a judgment for $32,500 for the loss of an arm in 1917, in Boeder v. Erie R.R. Co., 164 N.Y. Suppl. 167. In the case of Ga. Ry. & Power Co. v. Simms, 126 S. E.850, a judgment recovered by the plaintiff for the loss of a leg, in the sum of $37,500 was sustained. The Supreme Court of Ohio sustained a judgment for $75,000 in 1923, for the loss of both legs, in T.C. & C.R.R.Co v. Miller, 140 N. E. 617, and in 1911 the Supreme Court of California required a remittitur of $30,000 on a judgment

of $100,000 for the loss of both legs, in the case of Zibell v. So. Pacific R. R. Co., 116 Pac. 513. While the judgment for $35,000 for the loss of the right leg below the knee by a boy 14 or 15 years of age may beconsidered a liberal award of damages, we are not disposed, under conditions as they prevail today with regard to living costs and the purchasing value of money, to consider them so excessive as to call for a remittitur. And certainly, such damages could not be considered as being so excessive as to indicate passion, prejudice or undue sympathy on the part of the jury, such as to call for a setting aside of the verdict and judgment.

For the reasons stated in the foregoing opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

147 - 29990

HARRY F. CURLEY,

Plaintiff in Error,

v.

CHICAGO CITY RAILWAY COMPANY, ET AL.,

Defendants in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

239 I.A. 675

Opinion filed Dec. 23, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover damages for personal injuries. The case was tried before a judge and a jury; there was a judgment in defendants favor and plaintiff has sued out this writ of error.

The record discloses that between four and five o'clock on Sunday afternoon of October 1, 1922, plaintiff who was thirty-two years of age, was driving a Ford sedan automobile in an easterly direction on 59th street, Chicago, and it collided with one of defendants' west bound street cars. Plaintiff was severely injured. He asks for a reversal of the judgment "upon the ground that the trial court committed reversible errors in its rulings upon the instructions and in its rulings upon the admission and exclusion of evidence."

From the evidence it appears that on the day in question, plaintiff and his wife were visiting plaintiff's parents, who lived at No. 715 West 59th street, Chicago, and shortly before the accident plaintiff's sister, together

with her young daughter about four years of age, drove up in front of her parents' home in her Ford sedan; that she stopped the automobile in front of her parents' home, and as there was an automobile standing near the curb, just to the east and in front of her car, she turned the front wheels slightly to the left so that she might be able to drive the car around the standing automobile, when her mother, plaintiff and his wife got into the automobile for the purpose of taking a ride. When she stopped the automobile she sounded her horn to notify plaintiff and the others that she was waiting for them and as she did not at once see any of them coming from the house, she decided to get out and go into the house for them. With this in mind, she locked the automobile by turning the key. This lock disconnected the steering apparatus from the front wheels so that it was impossible to guide the car. After locking the wheel she saw plaintiff, his wife and their mother coming from the house. The mother and plaintiff's wife got in the rear seat of the car. Plaintiff got in the car and sat at the wheel. His sister moved over on the front seat to his right with her little girl standing by her right side. Plaintiff then started the automobile without having done anything to ascertain whether it was locked. The automobile started in a northeasterly direction, which was the direction he desired to go and when the left front wheel had about reached the north rail of the south street car track, (there being a double line of street car tracks in that street) he endeavored to turn straight east in the south or east bound track by turning his steering wheel, but

since the locking of the automobile by his sister had disconnected the apparatus from the front wheels, the car continued in the northeasterly direction until the left front wheel had about reached the north rail of the north or west bound track, when for some unexplainable reason, according to the testimony of plaintiff's witnesses, the automobile turned in a southeasterly direction and when the left front wheel had reached a point about a foot south of the south rail of the north or west bound track, a west bound street car struck the automobile, severely injuring plaintiff, his sister, plaintiff's mother and the little child, each of whom had a suit pending against the street car company, claiming damages on account of the collision in question at the time of the trial of the instant case.

Plaintiff's contention shortly is, that he was guilty of no negligence in failing to discover that the steering wheel of the car was locked and that the motorman of the street car knew or should have known, by the exercise of ordinary care, of plaintiff's predicament in ample time to have stopped the street car and prevented the collision. On the other hand, the defendants' position, in brief, is that the car was not being operated at an excessive rate of speed - not more than twelve to fifteen miles per hour and that the motorman did all in his power to prevent the collision as soon as he was able to discover that a collision was imminent. Defendants' witnesses gave testimony to the effect that the automobile continued in a northeasterly direction until it collided with the left front

part of the car; that the motorman was guilty of no negligence and the contention is that, inasmuch as the verdict of the jury finding in defendants' favor is the only one justified under the evidence, it ought not to be disturbed.

Plaintiff, his sister who owned the automobile, his mother and one Boston, who was a passenger on the platform of the street car, gave testimony on behalf of the plaintiff as to the occurrence. The motorman and two passengers, one of whom was on the front platform of the street car and the other on the first cross seat on the south side of the street car, were called and testified, concerning the accident, by the defendants.

Plaintiff testified that he was 33 years of age and lived at Lake Zurich; that on the day in question, he and his wife were visiting his parents at their home in Chicago; that his sister drove up in her Ford Sedan in front of his parents' home between four and five o'clock Sunday afternoon; that his sister sounded her horn and their mother rapped on the window signaling that they would be out; that he got in the machine and took the wheel; that the car was near the south curb, a short distance west of another car standing near the curb; that the front wheels were cramped a little toward the northeast; that he had driven Ford cars before and other automobiles for about ten years - nearly every kind of a car in the army; that he understood the method of locking a Ford car; that when it is locked the steering wheel is disconnected, so that the automobile

cannot be guided; that he did nothing to ascertain whether the wheel was locked; that when they were ready to go, he simply started the car as it was headed in the direction he wanted to go; that in the direction it was traveling, it would go about three feet east to one foot north; that he intended to turn east in the south track; that when he had reached the proper point, he turned the wheel, but the car did not respond; that he was going about six or eight miles per hour; that the street was paved with brick and in good condition, with granite blocks between the street car rails and tracks; that the first he saw of the car was when he left the curb, and it was then about the middle of the block east of Union avenue, which would make the street car about 175 feet east of him; that when the automobile got somewhere near the north track, he put on thebrake to stop the car and for one unexplainable reason it turned to the southeast; that he then released the brake and let the machine coast and when the left front wheel was about one foot south of the south track the collision occurred and he lost consciousness. He further testified that he did not recall looking at the wheels of the automobile when he got into the car - did not notice how they were turned at that time; that he first discovered the wheel was locked when the automobile got into the west bound track. Boston testified that he was employed as a dining car waiter and was 34 years of age; that he had been to the offices of the attorneys for both parties and had made a statement to C. J. Rea, an employee of counsel for plaintiff; that at the time of the accident he was on the front platform of the street car with a man named Paradise; that

he saw the automobile turn out and come into the west bound track; that the automobile was about 100 feet from the street car when it got on to the north track; that the motorman was ringing his bell; that when the automobile and street car were about 30 feet apart he jumbed back into the car; that when the street car was fifty or sixty feet from the automobile, the motorman commenced putting on the air and ringing the bell; that the street car was going about 12 to 15 miles per hour. On cross-examination he testified that when the Ford left the curb, the street car was about 100 feet away; that he thought the automobile would turn east in the east bound track, but it appeared that the plaintiff lost control of the Ford.

Plaintiff's mother was called by plaintiff and testified that she was 59 years of age and had lived in this country forty years. She further testified concerning the parties getting into the Ford car in front of her house as above referred to; that when the automobile started up she saw the street car about the middle of the block, east of Union avenue, being the first north and south street east; that she next noticed the street car when the automobile was over the south rail of the north track, and that the street car was then about the east side of Union avenue; that the automobile turned southeasterly after it had reached the north rail of the southbound track. Upon cross-examination she testified that she had made a statement, in writing, to a representative of the street car company and she identified her signature signed to it. This statement was made twenty-three days after the accident and she was asked if she did not say in that state ent that "Just as we got from behind

the standing auto, I saw a west bound car coming 75 feet to the east', and she answered that she did not remember. When the defendant, later, put in their evidence that part of the written statement made by the witness as to how the accident occurred was read to the jury in which the above quoted statement as to the distance between the car and the automobile appears. The statement further reads, "I don't know anything about the condition of the steering wheel."

Clara Brocker, plaintiff's sister who owned the Ford car testified that after driving the car in front of her mother's home she turned slightly toward the north, sounded her horn to let the folks know she was there, stopped the car and then locked the steering wheel as she intended to go into the house, but did not remove the key because she then heard a rap on the window and saw her mother motion that she was coming out; that the witness then moved over to the right hand side of the seat and plaintiff then got in the car and took the wheel; that she never said anything to her brother about the car being locked; that she forgot it; that she did not tell him anything; that he started up in a northeasterly direction to pass around the automobile parked near the curb; that when she got near the east bound track she noticed plaintiff turning the wheel but the car did not change its direction; that when the automobile was between the two street car tracks, the street car was coming west just east of Union avenue and the plaintiff kept twisting the wheel; that when the automobile finally stopped

with its front wheel south of the north track, the street car was about 60 feet away. On cross-examination she testified that she had made a statement to one of defendants' representatives; that he asked her questions and wrote down the answers; that he then read it and handed it to her and asked her to sign it; that she glanced over it and signed it. When the defendants were putting in their evidence, their counsel read from Mrs. Brocker's statement in which it is stated that when the left side of the automobile was over the west bound track she saw the street car which was two or three lots east "coming at a terrific force"; that the steering wheel on the auto did not work properly.

For the defendant Paradise testified that he was an elevator conductor in the Federal Building but, prior to that time, had been a waiter on a dining car; that he was one of the passengers on the front vestibule of the street car; that he first saw the automobile on the south side of the street when it started from the curb in a northeasterly direction and at that time the street car had just crossed Union avenue; that the automobile kept on in the same direction until the collision occurred; that when the automobile got into the east bound track, the street car was about 50 feet away; that the street car was going about 10 to 15 miles per hour; that he was standing at the left hand side of the motorman. On cross-examination he testified the street car was about fifteen feet from the automobile when the automobile started into the north track; that prior to the trial he

had a talk with Nea, an employee of counsel for plaintiff in which he stated "At the time the automobile got into the west bound track or the track upon which we were operating, the street car, in my judgment was about fifty feet away from the auto." The motorman testified that he had been working as a motorman for about 5½ years; that the street car in question was about fifty feet long and weighed about 23 tons; that he first noticed the Ford after it had left the curb; that it was traveling in a northeasterly direction; that the street car was crossing Union avenue when the Ford left the curb; that he was going about 15 to 16 miles per hour; that there was no other traffic in the street; that he had no idea when the Ford started that it was going to drive across the west bound track; that he first realized this when about a car length away; that he saw the driver fumble with his wheel and heard screams of the people in the car; that as soon as he discovered this he threw his power off and applied the air, the emergency brake and his reverse; that the Ford seemed to increase its speed; that it did not stop at any time until the collision; that the left front end of the street car struck the right front end of the Ford; that he ran about 30 to 35 feet after the collision. White, who was a passenger on the street car, sitting on the first cross seat on the south side of the car, testified that when he saw the Ford leave the curb it was about 100 feet from the street car; that the Ford kept traveling in a northeasterly direction until the collision; that the street car was about 30 feet away when the automobile got to the east bound track; that the automobile was going about eight or ten miles per hour.

The evidence further shows that as a result of the collision, the automobile was near the south curb and some distance to the west of where the collision occurred. The evidence also shows that the west line of Union avenue was about 150 feet from the east line of No. 715 59th street; that Union avenue and West 59th street are both about 66 feet in width; that it is nearly 13 feet from the south curb of 59th street to the south rail of the east bound track. As is usual in such cases, the testimony of the several witnesses differs as to the location of the street car and the automobile at a given time and as to the distance between them when it became apparent that a collision would occur. There are other differences as to the physical situation and such differences are to be expected because they are but opinions of the several witnesses.

Counsel for plaintiff states that the controlling question is, was the street car a sufficient distance away from the automobile when it first became apparent that there would be a collision to enable the motorman, by the exercise of due care to have avoided the collision. It is contended that the evidence discloses that had the motorman exercised due care, the collision would not have occurred, and that this is shown by the fact that when the automobile reached the north rail of the south track and was still running in a northeasterly direction, it must have been apparent to the motorman, if he had looked, that the automobile was in danger of being struck by the car. This argument is based upon the proposition that the motorman knew that the steering apparatus on the automobile was out of order, but it is clear that he

had no such knowledge. For aught that appears, the motorman might well assume that when the automobile came from the curb in a northeasterly direction, it would be turned to the right out of the path of danger. Such occurrences are common every day. And it seems certain to us, upon a careful examination of all the evidence in the record, that the only verdict that would be warranted, would be one in favor of the defendants.

Plaintiff testified that he was familiar with the driving of automobiles, including Fords and was also familiar with the method by which they were locked and unlocked and yet according to his own testimony, he did nothing to ascertain whether the car was locked before he started from the curb. Moreover, it appears that neither in the written statement made by plaintiff's mother to a representative of the defendants, twenty-three days after the accident, nor in the statement made by plaintiff's sister, Mrs. Brooker, on the 8th of October, which was seven days after the accident, was anything said to the effect that the automobile was locked. The street car was running at an ordinary rate of speed. It was bright daylight. The surface of the street was in good condition and the testimony of the motorman and others tends to show that the motorman did everything in his power to prevent the collision when he saw that plaintiff was unable to drive out of the path of the car. Considering all these circumstances, we are of the opinion that the jury rendered the only verdict consistent with the evidence.

But plaintiff contends that the court erred in giving certain instructions on behalf of the defendants and in refusing one submitted by him. The court gave to the jury thirty-four instructions, seven at the request of plaintiff and twenty-seven at defendant's request. It refused but one instruction requested by plaintiff. By that instruction plaintiff requested the court to tell the jury that if they believed from the evidence, that defendants were guilty of negligence as alleged in the declaration, and that such negligence was a direct and proximate cause of plaintiff's injury; and if they further believed that plaintiff was in the exercise of ordinary care for his own safety, then if plaintiff's sister was guilty of negligence in and about the locking of the automobile, that fact would be no defense to the suit, provided they further believed from the evidence, that such negligence, if any, on behalf of the sister was not the sole, direct or proximate cause of plaintiff's injury, and that plaintiff did not cause, induce or contribute to his sister's negligence. This instruction is rather involved and apt to be misleading. The jury might be misled in that they might think that plaintiff could recover, although he was negligent in failing to ascertain that the machine was locked before he started from the curb. Opp v. Pryor, 234 Ill. 538. Moreover, we are of the opinion that a verdict in favor of the plaintiff could not stand in any view of the evidence, and, therefore, any error in regard to this or the other instructions, ought not to work a reversal of the judgment. What we have just said renders it unnecessary

to consider in detail plaintiff's objection to instructions given at the request of the defendants. Most of them were stock instructions in similar cases every day in Chicago and have been held in numerous cases not to be prejudicial.

Plaintiff further contends that the court committed serious errors in its rulings upon the admission and exclusion of evidence and in this connection, it is said that plaintiff's mother who testified in his behalf, was a very important witness, but it appeared upon her cross-examination that she had made a written statement to one of defendants' representatives which was in conflict in part with her testimony given on the trial; that the evidence shows that she was in bed at the time the statement was made and was in great pain; that defendants' representative testified that she said all the things contained in the written statement and that he had no difficulty in understanding her; that only part of the statement was read by counsel for the defendants, which part related to the question as to how the accident occurred; that another part of the written statement contained the nature of the mother's injuries, one of which as shown by the statement was a fracture of the left side of the jaw and that counsel for plaintiff should have been permitted to read this part of the statement as it tended to contradict the testimony given by defendants' representatives to the effect that he had no difficulty in understanding her, because the jury might well believe that a person with a fractured jaw could not be easily understood as defendants' represent-

ative testified. We think the court should have permitted counsel for the defendant to read that part of the statement, showing the fracture of the jaw bone as tending to show her physical condition as being some evidence that the jury might consider as to her ability to speak so that she was understood by defendants' representative. But we think that the error was of minor importance. In any event and certainly in view of what we have said, it was not of such a character as to warrant us in reversing the judgment. A further complaint in this connection is made by plaintiff as to the ruling of the court when the witness Boston was testifying. This witness was called by plaintiff and testified on direct-examination that the street car was about 100 feet from the automobile when the automobile got on to the west bound track. The record then discloses the following: "Mr. McShane: Q. Just to refresh your recollection, Mr. Boston, I will ask you if you did not say to Mr. Rea, that that automobile - - - * * *. Mr. Ryan: I object to it. Mr. McShane: All right, all right. I offer, however, just for the purpose of refreshing his recollection, only, to ask him if he did not say certain things. Mr. Ryan: I object to that. Mr. McShane: The court feels otherwise. The Court: You can't do that. Mr. McShane: All right. Exception. That is all." After the trial of the case and after the verdict had been returned and when plaintiff's motion for a new trial came on for hearing, counsel for plaintiff filed an affidavit in which it was set up that at the time he was examining Boston he had in his hand a written statement made by that witness to Rea in which statement the following appeared

"At the time the machine first got on to the tracks, our car was as far away from it as from here across the street (indicating a distance of about 150 to 200 feet)." So far as the record discloses the trial judge did not know what the statement contained and the matter was not brought to his attention until the motion for a new trial was being heard. In these circumstances, we think the point is not saved. Had the matter been brought to the attention of the trial judge during the examination of Boston, we think he should have been permitted to testify. Girdgus v. Van Kitten, 211 Ill. App. 524; Chicago City Ry. Co. v. Gregory, 221 Ill. 591; People v. O'Gara, 271 Ill. 138.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P. J. AND TAYLOR, J. CONCUR.

185 - 30037

SAMUEL KLEIN,
Appellee,

v.

E. EROL SMITH,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 675

Opinion filed Dec. 23, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover $2,000.00 which he claimed for services performed under an oral agreement entered into on or about May 18, 1922. The case was tried before the court without a jury, and there was a finding and judgment in plaintiff's favor for the amount of his claim and the defendant appeals.

The record discloses that the defendant was an architect and had been employed to prepare plans for a contemplated hotel building to be erected in Chicago; that plaintiff was a structural engineer and that sometime in May, 1922, the defendant talked to plaintiff about some changes in the plan of the hotel, which it was thought should be made and which would result in the saving of money. Thereupon, an oral agreement was entered into between the parties whereby plaintiff was to make drawings showing certain changes in the plans; that plaintiff afterwards made such drawings, gave them to the defendant and demanded $2,000.00, which he contended defendant had agreed to pay for the work. The

Feb - 1902

Kindly favor,

Yours truly,

P.

Respectfully,

defendant's position is that plaintiff was to make detail drawings, secure a permit and superintend the construction of the building, for which he was to be paid $3,000.00; that plaintiff did not make complete detail drawings, nor did he secure a permit for the building and it was never constructed, but the project was abandoned, and, therefore, plaintiff could not recover in this case because plaintiff's statement of claim is based upon an express contract, while the evidence shows that if he was entitled to anything, it would be on a quantum meruit. On the other hand, plaintiff's contention is that he was to make certain drawings which were to be sufficient only for the purpose of securing bids for the construction of the building; that he did this work for which he was to be paid $3,000.00; that he did not secure the permit as none was required, since the construction of the hotel was abandoned.

Plaintiff's statement of claim is based upon an express contract and it follows, therefore, that to entitle him to recover, he must prove performance of the contract, and this he contends he has done. The court found in his favor, entered judgment for the amount of his claim, and we think the evidence in the record warrants the finding.

Plaintiff gave testimony to the effect that the defendant had talked with him about the preparation of certain plans showing changes in the construction of the proposed hotel building, and that the defendant asked him what his charges for preparing the structural drawings in detail would be; that he replied, that his charges would be in the neighborhood of $7,00.00; that the defendant stated that he did not want to be obligated for that amount and it was

finally agreed that plaintiff would make such drawings as were sufficient to obtain bids for the construction work, and for this work, together with the obtaining of the permit from the city, plaintiff stated that the charge would be $2,000.00, and this was agreed to. Plaintiff further testified that he performed the work, except some minor part in reference to a stairway which would take about a day, but because defendant was in a hurry to have the plans so that he could obtain bids, the drawing for the stairway was not completed, but it was agreed by both parties that it was sufficiently complete to enable the taking of bids for the work; that after plaintiff did the work, he requested pay from time totime and that the defendant replied that he was not able to make the payment at the times requested as he was rather short for ready money. The defendant testified that when he talked to plaintiff, the latter stated that by making certain changes in the plans for the proposed hotel money could be saved; that thereupon he asked plaintiff what his charge would be to take care of the whole proposition, to which plaintiff replied that hewould charge between seven and eight thousand dollars to handle the whole construction work as far as reinforced concrete work was concerned, to which defendant replied that he thought the price was too high - that he could not pay so much money; that he then asked plaintiff what his charge would be for preparing "general structural drawings, steering the proposition through the city hall, to obtain the permit and giving me such supervision at the building as might be necessary to make his drawings con-

form with the construction as it went through and I wantedto know the price on that and I think he asked me about twenty-five hundred dollars". He further testified that plaintiff afterwards agreed to do this work for $2,000.00.

Benjamin I. Simpson testified for the defendant that he was present at a part of the conversations had between plaintiff and defendant when the agreement was entered into. He testified that at that time plaintiff stated to the defendant that he "would give us these drawings, enough to get figures on and other details would come later." A number of the drawings made by plaintiff were introduced in evidence as well as certain bills and letters sent by plaintiff to defendant, demanding payment, but they are not in the record.

We have examined all of the evidence in the record and are of the opinion that it justified the finding of the trial court. But, in any event, we are clearly of the opinion that we would not be warranted, in holding that the finding of the trial court in favor of the plaintiff was against the manifest weight of the evidence. It follows that the judgment of the Municipal Court of Chicago must be affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

261 - 30114

MACIEJ ZINKO,

Appellee,

v.

NORTHWESTERN TRUST & SAVINGS BANK,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

239 I.A. 676

Opinion filed Dec. 23, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $1720.00 with interest thereon at 5 percent covering a certain period of time, making a total of $2147.00. At the close of all the evidence, the court instructed the jury to return a verdict in plaintiff's favor for $1720.00. This was accordingly done, and thereafter judgment entered on the verdict, to reverse which defendant prosecutes this appeal.

Plaintiff in his amended statement of claim, alleged that on August 22, 1917, he turned over to the defendant $1720.00 for 8,000 Rubles, which the defendant for a consideration "agreed to remit (to a bank in Moscow, Russia) for deposit to plaintiff's credit; that said money has not been transmitted or deposited to the credit of the plaintiff", and that after waiting a reasonable length of time to ascertain if the deposit had been made as agreed, plaintiff demanded the return of his money from the defendant which was refused. The defendant filed an affidavit of merits in which it set

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up that on the 22nd of August, 1917, plaintiff requested it to purchase for him 8,000 Russian rubles, which plaintiff wanted remitted to Russia, and for this purpose plaintiff gave the defendant $1730.00; that the defendant with all reasonable dispatch purchased the 8,000 rubles of the American Express Company, paying therefor $1692.30. The affidavit of merits further set up that plaintiff requested the defendant to remit the money to a specified bank in Moscow, "through the usual and customary channels" employed by banks in Chicago,and particularly through the usual channels employed by the defendant for such purpose; that the American Express Company was at that time the usual and customary agency for such remittances employed by banks and other persons in Chicago; that owing to the chaotic conditions in Russia and the severance of diplomatic relations between that country and the United States and to the interruption of the mail service between those countries, the defendant was unable to receive definite information as to whether the 8,000 rubles had been deposited in the Moscow Bank but that to the defendant's best knowledge and belief the 8,000 rubles were duly remitted by the American Express Company to the Moscow Bank. It is further set up that at the time of the acceptance of the money from plaintiff, it was expressly agreed that the remittance of the money by defendant to the Russian bank was subject to delays resulting from war; that the American Express Company had been informed that the banks in Russia had been taken over by the Soviet Government, and therefore, it was impossible to secure any responses as to whether the money had been deposited in the Moscow bank.

A witness, called by the plaintiff, testified that in August, 1917, letters could be registered from this country to Moscow. Plaintiff testified in his own behalf that he was a depositor in the defendant bank and in August, 1917, talked with officials or employes of that bank, advising them that he was going to Moscow with a company of engineers and desired that his money be deposited in a bank in that city; that thereupon such employee of the defendant bank, stated "We guarantee and the post office guarantee to us; it is just as safe by us as in your pocket, because from your pocket somebody might steal, but from us it will never be lost." He further gave testimony to the effect that the next day he gave $1720.00 to a representative of the defendant with which the defendant was to purchase 8,000 rubles and deposit them to plaintiff's credit in a specified bank in Moscow and that at that time plaintiff was given the following receipt:

"August 22, 1917.

(Picture of a Boat) Accepted subject to Any Delays

No. 5994877

Received from...Maciej Zuiko.....

Seventeen Hundred Twenty..... Dollars

For (Foreign Money) 8,000 Rubles.....

To be remitted to Gosudarstwiemuji Bank.....

Residence Gorod, Moskwa, Russia.....

NORTH-WESTERN TRUST & SAVINGS BANK

Per.....H..P.....

$1720.00.

This remittance will be forwarded to the payee specified, subject to the rules and regulations of the Post Office Departments used in making the remittance."

Plaintiff further testified that on account of disturbances in Russia his trip to that country had been abandoned, and several months after August 28, 1917, when he gave the money to the defendant bank for remittance, he again called at the bank and told them that his trip to Russia had been abandoned and demanded his money but was then advised that the bank had not received the bank book from the Moscow bank, showing that the money had been deposited; that afterwards he made repeated demands to the bank for his money, but that he had not been paid, apparently because the defendant had not been able to ascertain whether the deposit had been made. The inability of the defendant to ascertain this was occasioned by the disturbances in Russia.

The defendant offered evidence, practically all of which, upon objection by plaintiff, was excluded, to the effect that it had sent plaintiff's money to the American Express Company; that the latter had cabled its correspondent at Petrograd, Russia, to charge its account with the amount of plaintiff's remittances; that the American Express Company sent a registered letter to Petrograd, giving instructions in the matter and that thebank at Petrograd had replied that it had done as the American Express Company had requested and had forwarded the plaintiff's money by courier to Moscow. In this connection a letter from an official of the Express Company to the bank at Petrograd, dated August 28, 1917, was offered in evidence referring to the transfer of plaintiff's money by number and saying: "Upon receipt of this letter kindly arrange to make the following payments as per details". The details showed that 8,000

rubles were to be deposited in the bank at Moscow to plaintiff's credit. The letter also said, "Please obtain and send us bank books covering the attached deposits." There was also offered in this connection a letter written by the Petrograd bank to the express company in reply to the letter of August 28th above mentioned, in which it was said, "In accordance with your letters of August 20 and 28, we have sent by courier * * * 8,000 rubles Mr. M. Zujko, No. 327 Moscow" for which service the Petrograd bank charged eight rubles.

Other evidence offered by the defendant tended to show that afterwards, a representative of the American Express Company went to Russia to ascertain whether the deposit had been made. It also appears that a great many similar remittances were made by the express company and representatives of the express company were in Russia endeavoring to find out if the remittances had been properly received or deposited but, on account of the disturbances in that country, they were unable to obtain the necessary information and were finally compelled to leave Russia; that the representatives of the American Express Company also took the matter up with the State Department of the United States and were advised that on account of the fact that this country had no diplomatic relations with Russia, the Department of State could give no assistance at that time.

The evidence offered by the defendant was rejected, apparently on the theory that it tended to vary the terms of the contract entered into between the parties, which plaintiff claimed was evidenced by the receipt which plaintiff received from the defendant and which is quoted above.

It is clear that the ruling was erroneous. The evidence should have been admitted. The receipt issued by the defendant for the money to plaintiff shows that the money was to be remitted by the defendant to the bank in Russia, and of course, this could be shown by evidence as to what the defendant did in the matter. Thisis not like the case of Silver v. Liberty Trust & Savings Bank, No. 28947, Appellate Court, First District. In that case the evidence tended to show that the defendant bank had agreed to have its cashier personally deliver the money in question to a designated person in Russia. It seems to be plaintiff's position that the contract entered into between him and the defendant was that the defendant would remit the money and deposit it in the bank at Russia without failure and without condition,- that the agreement of the defendant was absolute. And his further position seems to be that he has shown that this has not been done by the fact that a bank book was not delivered to him, showing that the deposit had been made in the Moscow bank. Plaintiff's further position is that it was an integral part of the defendant's agreement to deliver a bank book, showing the deposit, to plaintiff, and since this was not done, plaintiff had a right to rescind the contract and demand the return of his money. In support of this plaintiff's counsel cited the case of Bratspies v. Barrett, President of the Adams Express, 203 N.Y.S. 445; Cechanowicz v. State Bank, 224 Mich. 37, and other cases. In each of these cases, it is stated that the agreement for the remitting of money was upon condition that unless the defendant bank did produce a bank book, within a specified time, the money would be returned to plain-

tiff. There is no such agreement or evidence in the case before us. No such allegation appears in plaintiff's amended statement of claim, and it is clear that the contention now made is an afterthought.

The facts in the case at bar are quite similar to the facts in the case of Fishman v. West Side Natl. Bank of Chicago, 228 Ill. App. 315 and Reis v. Liberty Trust & Savings Bank, 227 Ill. App. 405.

We think we ought to say that there was no error in the ruling of the trial court in its refusal to grant a continuance on the ground that the defendant was taken by surprise, because the testimony of plaintiff as to what was said by a representative of the bank was entirely proper and if defendant sought to contradict such testimony, it should have the proper witness or his deposition on this point.

For the error in rejecting the evidence offered by the defendant, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

270 - 30123

SUSAN STEWART,
Appellee,
v.
CITY OF CHICAGO,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

239 I.A. 676

Opinion filed Dec. 23, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the City of Chicago to recover damages for personal injuries claimed to have been sustained by her by reason of her falling and being injured, on account of a defective sidewalk on the south side of 71st street in Chicago. The case was tried before a judge and a jury and there was a verdict and judgment in plaintiff's favor for $3,000.00.

The record discloses that about five o'clock on the evening of December 13, 1921, as it was just getting dark, plaintiff was walking west on the cement sidewalk on the south side of 71st street carrying her baby in her arms; that she stepped in a hole in the cement sidewalk, which was four or five inches deep and about nine inches wide, which caused her to fall and fracture her ankle. Shortly thereafter she received medical and surgical attention and her ankle was placed in a plaster cast and it remained in the cast for about five weeks. After the cast was taken off, plaintiff was lame for a year or more and it

Opinion filed Dec. 23, 1905.

pained her to walk. The evidence further shows that at the time of the trial which was about three years after the injury, when she walked any distance, her ankle swelled up and became painful. In addition to the fracture, the evidence discloses that there were torn ligaments and there was evidence to the effect that the injury was permanent. As part of plaintiff's case, a photograph of the sidewalk in question was introduced in evidence, which is in the record, and when this was offered counsel for plaintiff indicated the place where the hole was in the sidewalk by drawing an arrow on the picture. Afterwards when defendant was putting in its defense and had a witness on the stand, counsel for the defendant asked this question: "Directing your attention to the spot indicated by the arrow, tell the jury, what it looks like, whether there is a hole or not a hole and whether the macadam is taken out and how deep it is?" Objection was sustained to this question and the defendant contends that this was error for the reason that a witness for plaintiff 'was allowed to testify as to the presence of the same hole at the time of the trial.' The question is ambiguous. If counsel was endeavoring to ascertain what the photograph showed, the question was objectionable, because the jury could see the photograph, as well as the witness. If he was interrogating the witness as to the extent of the hole or whether there was a hole in the sidewalk, it should have been limited to the condition of the sidewalk at the time of the injury. But in any event, there is no serious error because this same witness was later permitted to testify as to the extent of the hole. He testified, 'I would say that this

looks like the hole; the surface is off the sidewalk, that is about it, perhaps the hole might be an inch in depth or an inch and a half, somewhere around an inch, the depth of the hole, that is the upper surface of the sidewalk is removed." Of course, the vital question in the case, was the extent of the hole in the sidewalk at the time of the accident. It is not every defect in the sidewalk that renders the city liable for injury occasioned by such defect. Sidewalks cannot all be maintained in perfect condition and if the condition of the sidewalk was as testified to by the witness for the city, we would not hesitate to reverse the judgment even though such defect may have caused the injury. But evidence on behalf of the plaintiff tended to show that the hole was four or five inches deep and about nine inches wide, and that it had been in that condition for a long period of time prior to the accident.

The defendant next contends that the court should have instructed the jury to find for the defendant as it requested, because the declaration alleged that after the accident the city had been notified that plaintiff resided at No. 6324 Champlain avenue, while the proof showed that she lived at No. 6326 Champlain avenue, and it is said that this constituted a fatal variance between the allegations and the proof. There is no merit in this contention. The evidence discloses that the two numbers were given to the same building, one to the apartment upstairs and one to the apartment on the first floor. The building was but 25 feet wide. At the time of the accident plaintiff's parents and her

married sister lived in the building in both apartments. And at the time plaintiff's family lived part of the time upstairs and part of the time downstairs. The objection is trivial and is entirely without merit.

Defendant next contends that the damages are grossly excessive and in support of this the case of Goodsell v. City of Joliet, 160 Ill. App. 519 is cited. The opinion in that case was rendered in 1909, and is, therefore, of little value on this question. As we said in Posch v. Chicago Railways Co., 231 Ill. App. 241, "The amount of the damages in cases of this character depends upon the circumstances of the case and is not a matter of mathematical computation. The damages awarded by the jury may be larger than would have been sustained a few years ago and on the question of the amount, the earlier decisions of this State are of little assistance. We, cannot, however, be unmindful of the fact that the money value of life and health is appreciating and the purchasing powerof money depreciating during recent years. From what we have said of the nature and extent of plaintiff's injuries, we think we would not be warranted in holding the amount so excessive as to require interference on our part.

Complaint is also made as to the admission of the testimony of Dr. Moeller, wherein he was permitted over objection to testify to the several dates upon which he visited the plaintiff, on the ground that his testimony was based upon his book entries. There is no merit

in this point. But counsel's contention is not borne out by the record. The doctor testified that he had examined his records which had refreshed his memory so that he had an independent recollection of the facts. There being no serious error in the record, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

278 - 30132

PEOPLE, EX REL MATHIAS IGLER,
Appellee,

v.

WILLIAM E. DEVER, MAYOR, ET AL,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 676

Opinion filed Dec. 23, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal the defendants seek to reverse an order entered by the Superior Court of Cook County, awarding the relator a writ of mandamus commanding the defendants to issue a license to the relator to conduct a coffee house at No.1627 Melrose street, Chicago. The case went to trial on the petition of Igler, and the answer of the defendants. A jury was waived and the matter submitted to the court, who after hearing the evidence awarded the writ.

The relator Mathias Igler, testified that he owned the two story building at No.1627 Melrose street and conducted a restaurant on the first floor and lived upstairs with his family, which consisted of his wife and two children; that he had been a citizen of the United States for about twelve years; that he was never arrested for any crime or misdemeanor; that there were fifty-five seats in the restaurant, which was located next to a bank and that a great many business people ate there every day. On cross-examination he testified that he was at his place of business on April

Opinion filed Dec. 23, 1926.

7, 1924, when three police officers entered the restaurant; that at that time he was operating a coffee shop under a license issued to Arthur Jensen, and that he had been operating under such license since January 1, 1924; that Arthur Jensen had no connection with the place on April 7, 1924, and was not working there; that when the officers came in, which was after dinner time, he had two waiters working and the officers went through the building, but could find nothing; that they afterwards went into the kitchen and said they found a little bottle that had some liquor in it; that this was found in a back room near the kitchen; that he did not know how the bottle got there or anything about it. He further testified in rebuttal that he did not sell any liquor on the premises.

One of the officers, Emil O. Boettcher, called on behalf of the defendants, testified that he together with two other officers, who went to the premises on April 7, 1924, had been assigned by the Superintendent of Police of the city to investigate coffee shops; that on April 7, he, with Lieutenant Barry and Sargent Firsch, entered the soft drink parlor and stepped into the rear rooms, that there they found three or four men sitting at a table with some whiskey or wine glasses on the table; that he smelled of the glasses and the witnesses then stated to Sargent Firsch, who was with him, "This fellow has got some booze back here." "So I went out to the bar and picked up a few more glasses which contained liquor * * *. So I walked back to the kitchen and there was a door leading there on the west wall to a little room there, and a waiter snuck into that room, and slammed

the door. I says to Frank Firsch, 'I says, 'Evidently that is where he keeps his liquor.' So I started out to the front again and Frank and I made believe we went out and doubled back and wrapped at the door, and a waiter opened the door;" that they then went into the room and found eight or ten containers which were filled with liquor and held about "just enough for one drink"; that they also found about a pint or two of other liquor; that the liquor was whiskey; that Igler was there at the time and upon inquiry Igler stated he was the proprietor. The officers then placed him under arrest. That matter was heard before the Municipal Court, the witnesses testified, and afterwards the evidence was suppressed and Igler discharged because of lack of a search warrant. This evidence was substantially corroborated by Lieutenant Barry. This is all of the evidence in the record.

The law is well settled that a writ of mandamus will not beawarded unless the party applying for it shows a clear legal right to have the thing done by the person or persons sought to be coerced. It is also equally well settled that where it is sought, by means of a writ of mandamus to compel an official to issue a license and the official has a discretionary power as to whether the license should or should not be issued, the writ will be denied, unless it is clear that the official has acted arbitrarily, and where such question is doubtful, the writ will not be awarded.

Section 2411 of the ordinances of Chicago, provides that if at any time after the granting of any license, any departmental head shall certify to the Mayor that the licensee

is violating any ordinance of the city or any statute of the state in the conduct of his business, the Mayor shall have power to revoke the license. And by section 2425 it is provided that the Mayor shall have power to order and grant applications for licenses upon the terms specified in the ordinance, and that all licenses shall be issued to such persons as shall comply with the provisions of the ordinance and as the Mayor "in his discretion shall deem suitable and proper persons to be licensed." It will thus be seen that the ordinance expressly clothes the Mayor of the city with discretion in the issuance of licenses such as the license in question, and unless we can say that he arbitrarily abused his discretionary power in refusing the license to the relator, the writ ought not to be awarded. Upon a careful consideration of all the evidence in the record, we are of the opinion that it cannot be said that the Mayor acted arbitrarily in the matter, but, in any view of the evidence, the most that could be said is that whether the Mayor acted arbitrarily was doubtful. This being true, it follows that the writ should not have been awarded. Apparently the learned trial judge awarded the writ for the reason that it appeared from a letter written by the corporation counsel to the relator's counsel, a copy of which was sent to the trial judge, that the license would be issued to the relator, if it were shown that there was no collusion between the relator and Jensen, who held theformer license which had been revoked. The corporation counsel in the letter stated that this might be shown if the relator were examinedunder oath on the question. This letter was written while the present suit was pending, and since the relator testified on the hearing of the

case that Jensen was in no way connected with the business and was not even working for the relator on April 7, when the officers found the liquor on the premises, the court probably was of the opinion that the condition mentioned in the corporation counsel's letter had been complied with, but the letter is not in the bill of exceptions, but it has been merely inserted in the common law record, and therefore, cannot be considered by us.

For the reasons stated, the judgment of the Superior Court of Cook County is reversed.

REVERSED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

293 - 30145

ALONZO D. ERFURTH,

Appellee,

v.

SUSAN K. ERFURTH,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

239 I.A. 676

Opinion filed Dec. 23, 1925.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Complainant filed his bill for a divorce against the defendant on the ground of adultery and praying that he be given the custody of their child and for other relief. The defendant filed an answer denying the charges made against her and filed a cross bill praying for a divorce from the complainant, charging him with extreme and repeated cruelty. He filed an answer to the cross bill, denying the charges made against him. The case was heard before the chancellor, who found in favor of the complainant and against the defendant and a decree was entered awarding complainant a divorce, the custody of the child and a division of their property. The cross bill was dismissed. The defendant prosecutes this appeal and contends that the court erred in finding that she was guilty of adultery as charged in the bill of complaint and in not finding that complainant was guilty of extreme and repeated cruelty as charged in the cross bill. And further that the court should have awarded her the custody of the child and a half interest in what was referred to as the Lombard

Opinion filed Dec. 23, 1936.

2391 I.A. 676

property.

The record discloses that complainant and defendant were married on June 12, 1920 and that as a result of the marriage, a son was born to them, who was about 3½ years of age at the time of the trial. The evidence tends to show that complainant and defendant lived together as husband and wife and got along fairly well together until Eugene May, named in the bill as co-respondent, began to pay attention to the defendant; that prior to the marriage May had been a suitor of the defendant for approximately a year when he was inducted into the army during the world war; that while he was in the army complainant and the defendant married. After the war May returned and was married. His wife died and afterwards he renewed his acquaintance with the defendant. The evidence tends to show that he attended a birthday party, given at complainant's and defendant's home and that afterwards he met the defendant and went with her a number of times to different theaters. The evidence further tends to show that after May renewed his acquaintance with the defendant quarrels arose between complainant and the defendant; that on February 20, 1924, when complainant arrived to his home at Brookfield after his day's work, he found that defendant had taken nearly all of the furniture and moved to La Grange; that afterwards he went to the house where the defendant was living in La Grange for the purpose of seeing their child and found May at the house; that later he procured warrants to be issued for the arrest of May and the defendant and they were placed under arrest and tried before a magistrate.

The defendant offered evidence denying that she was guilty of adultery as charged and also introduced evidence in an endeavor to sustain the charge of extreme and repeated cruelty as alleged in her cross bill. There was further evidence offered by the complainant denying that he had been guilty of the cruelty charged. At the close of all the evidence the court rendered an oral opinion which is in the record wherein he discussed the evidence somewhat in detail and found that the charge of adultery had been sustained. A reading of the opinion of the chancellor discloses the fact that he gave very careful consideration to the evidence. It would serve no useful purpose to analyze the evidence in detail, but after a careful consideration of all the evidence in the record, we are of the opinion that the evidence warrants the finding of the chancellor, and it is certain that this court of review would not be warranted in holding that the finding was against the manifest weight of the evidence. The chancellor saw and heard the witnesses testify and was in a much better position to determine the truth of the matter in controversy than we are where we only have the printed page before us. He entered a decree in which he found that the charge made in the bill was sustained and that the defendant and cross-complainant had not maintained, by a preponderance of the evidence, that the complainant and cross-defendant was guilty of extreme and repeated cruelty as charged in the cross-bill, and from a careful consideration of the record, we are of the opinion that we would not be warranted under the law in disturbing the decree.

The evidence in the record tends to show that complainant was an industrious and hard working man and an entirely proper person to have the custody of his four year old boy; that complainant was making his home with his mother and that this home was a proper place for the child. The evidence further shows that the co-respondent, May, was practically living at the defendant's home in La Grange and we cannot say that the court erred in awarding the custody of the boy to the father, provision having been made in the decree for the mother to visit the child and to have the child in her company one day each week and one-half of the holidays for three weeks during the summer vacation.

Defendant further contends that the court should have given her half interest in the Lombard property, which appears to be a two acre tract. When complainant was on the stand, he testified he thought, in case there was a divorce, defendant would be entitled to one-half interest in this property, and the evidence discloses that he was making small weekly payments on this property and had paid $466.00 on account of the purchase price. An examination of the opinion rendered by the chancellor discloses the fact that the court in computing the amount which complainant should pay to the defendant, awarded her one-half of the $466.00. So that it appears that she got one-half of the complainant's interest in that property. There was no evidence as to the value of this property, whether it would be more or less than when complainant had agreed to pay for it. It is unnecessary to consider the division of the other pro-

perty, as the only complaint is that the court should have awarded her one-half of the Lombard property, and since this was done, we think the point is not well taken. Complaint is also made that the court refused to permit the co-respondent, Eugene May, to testify. The record discloses that at the beginning of the trial, on motion of counsel for the defendant, the court excluded the witnesses; that afterwards during the trial May appeared from time to time in the court room; and that near the close of the case when nearly all of the evidence was in, the court inquired of the defendant as to where May was, that she replied that she did not know; that she had last seen him in the court room on that date. Shortly thereafter the court rendered his oral opinion. Several days afterwards when the parties appeared in the court, for the purpose of having the decree entered in accordance with the opinion of the court, the defendant was represented by additional counsel and at that time stated to the court that they desired to call May as a witness and that he would deny the charges of adultery. The court refused to open up the case, stating that he had decided the matter several days before. In these circumstances, we think the action of the trial court was entirely proper. The matter was within the discretion of the court. May had been in court and the chancellor specially inquired of defendant when she had last seen him. Certainly if defendant desired to call him that was the time to do so. And having failed to call May until long after the court had decided the cause, it is certain that we could not say that the chancellor abused his discretion.

The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. CONCUR.

BENJAMIN HARRIS,
Appellee,

v.

IKE MLAWSKY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

239 I.A. 676

Opinion filed Dec. 23, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Pursuant to the terms of a written lease on June 17, 1924, a judgment by confession for two months rent, at $70.00 a month, and $20.00 attorney's fees, making a total of $160.00, was entered in the Municipal Court in favor of the plaintiff, the lessor, and against the defendant, the lessee. By stipulation, the judgment was vacated and the defendant filed an affidavit of merits. In that pleading, the defendant set up that the plaintiff agreed to release the defendant from the terms of the lease upon the condition that the defendant vacate the premises; that pursuant thereto the defendant did vacate the premises. It further set up that the plaintiff did not do anything towards renting the premises so as to minimize the damages.

Subsequent to the filing of the affidavit of merits, there was a trial before the court, without a jury, and the judgment by confession was confirmed. This appeal is therefrom.

For the defendant, two contentions are made; first, that the trial judge erred in refusing to permit him to show that he authorized his wife, Bessie Mlawsky, as his agent, to

Opinion filed Dec. 23, 1938.

speak to the plaintiff, the lessor, in regard to vacating the premises, the refusal being put on the ground that the defendant's wife could not testify as agent of her husband; second, that the plaintiff failed to make a reasonable effort to re-rent the premises and thereby reduce his, the defendant's liability.

For the defendant, four witnesses testified, the defendant and his wife and the plaintiff and his wife. The defendant testified that his wife rented the apartment from the plaintiff for him, the defendant; that in the latter part of April, 1924, he authorized his wife to discuss with the plaintiff, on his, the defendant's behalf, whether the plaintiff would release him from liability on the lease. The defendant was then asked by his counsel, "Did you or did you not ask your wife to go to Mr. Harris?" On the ground that such a conversation between husband and wife was inadmissible, counsel for the plaintiff objected, and the trial judge, sustained the objection.

The defendant's wife testified that she had a conversation with the plaintiff in thelast week of April, 1924, in reference to the vacating of the premises. She was then asked if she had any conversation with the plaintiff in April, 1924, on her husband's behalf. That question was objected to and the objection sustained. She was, also, asked by defendant's counsel if the plaintiff at any time authorized her to tell her husband that he would consent to vacating the apartment. An objection to that was sustained, apparently, because, as the trial judge had already refused to allow the defendant even to undertake to show that his wife acted

as his agent, a fortiori, he, the defendant, could not be allowed to have his wife testify to what actually was said in a conversation between her and the plaintiff.

The plaintiff, who succeeded the defendant's wife as a witness, and was called by the defendant, testified that he had a conversation with her and that she asked him if they, meaning the defendant and his family, could move, and if he would release her husband from liability on the lease. An objection to that was made by counsel for the plaintiff, but no motion was made to strike the answer. The witness was then asked if it was not a fact that he told her, defendant's wife, to tell her husband that they could vacate the apartment which they occupied? That was objected to, and the objection sustained.

Eva Harris, the plaintiff's wife, called by the defendant, testified that under instruction from her husband she rented the apartments in the building in question. Following that testimony there was a colloquy between the trial judge and counsel, and then counsel for the defendant made an offer to prove that the defendant authorized his wife to speak on his behalf in regard to a cancellation of the lease; that at the request of her husband she spoke to the plaintiff in regard to the cancellation at the home of the plaintiff a week prior to May 1, 1924; and that the plaintiff told her that they could vacate the apartment and he, the plaintiff, would consider the lease cancelled. Upon objection, the trial judge ruled that the proffered evidence was inadmissible.

In our judgment, inasmuch as the evidence shows that the original transaction, the renting of the apartment, was brought about by the wife acting on behalf of her husband, it was proper for him, the defendant, to undertake to prove that he constituted his wife his agent and authorized her to speak with the plaintiff on his, the defendant's behalf in regard to a cancellation of the lease, and, also, what was said, if anything, between the defendant's wife and the plaintiff in regard to a cancellation of the lease.

One of the exceptions set forth in Sec. 5, Chap.51 (Cahill's Revs. Stats. of 1935), which permits a wife to testify, is as follows: "in all matters of business transtions where the transaction was had and conducted by such married woman as agent of her husband." Pursuant to the principle involved in that exception, we think the defendant was entitled to show that he made his wife his agent in the matter, and, also, to show that, if anything, she did as his agent in dealing with the plaintiff in regard to a vacation of the premises. Case v. Fagin, 221 Ill. App. 309.

In the stipulation of fact in Donk Bros. Coal Co. v. Stroetter, 239 Ill. 134, the evidence did not show that anything in the nature of a business transaction had taken place between the wife and the third person. In that case Mr. Justice Dunn said, "She testified that her husband sent her to Mr. Donk's office, and she had this conversation with Mr. Donk as the agent of her husband. But she conducted no business. To make a wife a competent witness in this cause it should appear that she was authorized by her husband to

conduct some business transaction for him, which she did conduct, and then she may testify." In the instant case she acted as agent of her husband in the making of the lease, and at the trial the husband desired to show what she did as his agent in regard to the termination of the lease itself. The facts in the instant case, therefore, are quite different from those in the Donk Bros. Coal Co. case, and justify us in concluding that the proffered evidence was competent.

As to the contention that the plaintiff was bound to use reasonable efforts to rent the premises, it is sufficient to say that under clause 7 in the lease, the plaintiff had authority to relet them at a figure to be determined upon by him. And, although the defendant's rent under the lease was $70.00 a month, the plaintiff, upon a vacation by the tenant was entitled to ask, if he saw fit, $80.00, or any other sum, not shown to be unreasonable.

For the errors pointedout, the judgment will be reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

376 - 30129

PEOPLE OF THE STATE OF ILLINOIS, EX REL WILLIAM S. DUNDERDALE,

Appellee,

v.

CITY OF CHICAGO, ET AL,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

239 I.A. 677

Opinion filed Dec. 23, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 18, 1924, the petitioner, William S. Dunderdale, filed a petition in the Superior Court of Cook County, praying for a writ of mandamus directed to the City of Chicago and the President of the Board of Local Improvements to reinstate him as paving inspector and to pay him certain amounts as salary. The respondents filed a demurrer to the petition. The demurrer was overruled, and the respondents electing to stand by their demurrer, judgment was entered that the writ of mandamus issue, the respondents to reinstate the petitioner and pay him his salary at the rate of $2100.00 per annum for the period from May 18, 1924 to August 22, 1924, and for a period from September 4, 1924, to December 4, 1924, and for a period from December 8, 1924, to the date of the order, being in all $1,000.00, after deducting certain pension payments. This appeal is from that judgment.

It is claimed for the respondents that the petition is insufficient in that it does not show or

Opinion filed Dec. 23, 1925.

allege the legal existence of the office of paving inspector and petitioner's right to occupy it.

By the petition it is represented that on November 10, 1914, the petitioner took and passed the Civil Service examination for the position of paving inspector of the City of Chicago, and was posted on the eligible register by the Civil Service Commission for that position; that on September 13, 1915, he was duly appointed to the position of paving inspector, and remained in that office or position until the date of his petition; that on February 1, 1924, there was appropriated by the City Council of the City of Chicago, in its annual appropriation bill $2100.00 for said position or office, payable at the rate of $83.33 bi-monthly, after deducting the amount due the Pension Fund; that from May 18, 1924, to August 22, 1924, and from September 4, 1924, to December 5, 1924, and from December 6, 1924 to the date of his petition, without any fault on his part, he was not permitted to work in said position of paving inspector; that he was not laid off for lack of work or other good cause; that many other paving inspectors junior to him upon the Civil Service Register were retained and paid salaries for said periods; that during the time in question he was willing and able to do the work of the position, except that from May 20, 1924 to July 3, 1924, owing to a sprained ankle, he was under the care of a physician and was not permitted to stand or walk on the injured leg; that he notified John B. Hittel, Chief Street Engineer, his immediate superior, and John J. Sloan, president of the

Department or Board of Local Improvements, of his illness; that on June 25, 1924, charges were preferred and filed before the Civil Service Commission against him, charging him with being absent without leave from May 17, 1924 to June 35, 1924; that he was notified of said charges; that the matter came on for hearing before the Civil Service Commission, and on July 23, 1924, the Commission entered an order that the evidence in support of the charges was insufficient to warrant his removal, and recommended that he be penalized by the loss of salary for a thirty day suspension period.

The petitioner further states in his petition that on August 22, 1924, he was permitted to resume his work, but was again suspended on September 4, 1924, for thirty days; that certain charges were preferred on October 8, 1924, and were mailed to petitioner at 344 North Lockwood avenue, a place where the petitioner had not lived since April, 1924; that he, the petitioner at that time lived at 618 Dole avenue, and had notified the respondents of the change of his address; that he did not receive the charges of October 8, 1924; that the respondents had systematically, since September 4, 1924, filed charges each thirty days and suspended him for thirty days at each of said hearings, contrary to the Civil Service law; that afterwards on November 7, 1924, he was again charged before the Civil Service Commission, which charge was as follows: "Charges, suspension for thirty days by order of Civil Service Commission and ordered to report for duty on November 4, 1924, failed to

report on November 4, 1924, and has not reported since, either by person or by phone;" that a copy of those charges were served upon him, and he was notified to appear before the Civil Service Commission on November 14, 1924, for trial; that on November 15, 1924, the Board of Local Improvements sent him a letter informing him that he had been suspended for a period of thirty days from November 4, 1924, and directing him to report for duty on December 5, 1924, at the expiration of the suspension period; that on December 5, 1924, he received a letter from Hittel, Chief Engineer of Streets, notifying him that "Owing to lack of work you are laid off today, December 5, 1924," and directing him to turn in his badge and records; that on December 5, 1924, there was work for paving inspectors, and there still is work for him, the petitioner, to do in his office or position; that the letter just mentioned was a subterfuge for the purpose of dispensing with his services; that at the time of the appropriation in February, 1924, "it was discussed by the City Council of the City of Chicago and the Finance Committee thereof that the said appropriation be made in the sum of $2100.00, and to provide steady employment throughout the year for paving inspectors," which wages were a lower figure than the City had been paying for paving inspectors by the day.

The petition prayed that a writ of mandamus issue directed to the respondents, directing them to reinstate him and to pay him his salary at the rate of $2100 per annum for the period from May 18, 1924, to

August 22, 1924, and for the period from September 4, 1924 to December 4, 1924, and for the period from December 6, down to the present date, and that they be compelled to pay him his salary in the future as appropriated by the City Council of the City of Chicago.

No brief has been filed for the petitioner.

It is urged for the respondents that as the petition does not show that the office or position of paving inspector existed, it is, on its face, insufficient. In Bullis v. City of Chicago, 235 Ill. 472, where a suit was brought for salary as a police patrolman, the court held that as such an office was unknown to the common law, and wherever it exists, it is the result of statute or ordinance, the legal existence of the office and the legal right to hold it must be proved. The court thereasaid,

> "The appellee by his suit was demanding the salary of the office of police patrolman, and it was therefore incumbent on him to show the legal existence of the office and his legal right to hold it. (Stott v. City of Chicago, 205 Ill. 281; People v. City of Chicago, 210 id. 479; McNeill v. City of Chicago, 212 id. 481; Moon v. Mayor, 214 id.40; Kennealy v. City of Chicago, 220 id. 485). The office of policeman or police patrolman was unknown to the common law and whenever such office exists it is the creation of the statute law or municipal ordinance. (Stott v. City of Chicago; People v. City of Chicago; Moon v. Mayor, supra.)

Following that decision, it was held in Gersch v. City of Chicago, 250 Ill. 551, that a petition for a writ of mandamus by one claiming to be a police patrolman to have his name put on the roster and for salary "cannot be

maintained without an ordinance creating the office;" and that as the petition failed to allege the existence of an ordinance creating such office, it was demurrable.

In the instant case, however, it is set forth in the petition that the petitioner, on November 10, 1914, "took the Civil Service examination for the office or position of paving inspector in the City of Chicago; that he passed said examination with a mark of 70, the required mark for passing and being posted on the eligible register of said office; that he was posted on the eligible register by the Civil Service Commission for said office or position; that afterwards on to-wit, September 13, 1915, he was duly appointed to the office or position of paving inspector, and remained in said office or position, and still remains in said office or position," and those facts, we think, are sufficient to justify the conclusion that the office or position of paving inspector had been created. Certainly, in the face of those facts, it would be unreasonable to hold that as a matter of pleading, the petitioner should go further and set up the ordinance which created the office or position. To argue that what was done by the petitioner by and through the Civil Service Commission and by the Commission itself, may all have taken place without there being any such office or position, is too far fetched, and especially when the matter involved was merely one of pleading and not of proof. And that conclusion produces no special hardship as to the respondents. For even if as a matter of fact there was no such office or position it could readily be shown on the trial of the issues.

This court held in O'Brien v. Frazier, 328 Ill. App. 118, where the petitioner prayed for a writ of mandamus directed to the three Civil Service Commissioners and to the Chief of the Fire Department in the City of Chicago, commanding the Commissioners to certify the name of the petitioner to the Chief of the Fire Department as being eligible for promotion to a lieutenancy in the Fire Department, and directing the Chief of the Department to promote the petitioner accordingly, that the petition was not defective nor subject to demurrer even though it contained no reference to any ordinance. The language of Mr. Justice O'Connor in that case is as follows:

> "But we are of the opinion that it was not necessary to refer to an ordinance at all in the petition, because it is there alleged that petitioner was a civil service employee and qualified to take the promotional examination for the position of lieutenant in the fire department; that the Civil Service Act applied to Chicago, and that respondents, the civil service commissioners, held such promotional examination; that the petitioner successfully passed this examination and his name was placed upon the register of persons eligible for promotion; that afterwards the persons whose names appeared above petitioner were certified by the commissioners and appointed to the position of lieutenant in the fire department * * * Public officials are presumed to perform the duties delegated by law to them and it would be idle to say that the commissioners would have gone through the form of holding promotional examinations, preparing a register and certifying names therefrom if the office had not been properly created. Law v. People, 87 Ill. 385."

It is contended further that the petitioner did not show that he was entitled to the $1,000.00 of salary under an ordinance of February 1, 1924, because he performed no services from May 18, 1924, to the date of the

petition, December 16, 1924. But it is alleged that during that time, without any fault on his part, he was not permitted to work as paving inspector. That is allegation enough, and if true would justify the conclusion that he was entitled to the salary for the time mentioned.

It is contended that his suspension was expressly authorized by section 12 of the Act to regulate the Civil Service of Cities; that it provides for the removal of employees upon written charges after a hearing. But, the allegations dispute the action of the Civil Service Commission, and, also, charge that his final dismissal was a subterfuge, as there was plenty of work for him as paving inspector at the time of his discharge.

As to the contention that no ordinance of February 1, 1924, making an appropriation was set up, it is sufficient to refer to the allegation that there was appropriated by the City Council of Chicago, in its annual appropriation bill, $2100.00 for his position of office, and that it was payable at the rate of $88.33, bi-monthly, after deducting the amount due the Pension Fund.

The same rules of pleading apply to a petition for a writ of mandamus as to a declaration or a bill in equity. It is no more necessary to plead the evidence in one case than in the other.

The judgment will be affirmed.

AFFIRMED.

THOMSON, P. J. AND O'CONNOR, J. CONCUR.

The judgment will be affirmed.

In one case then in the other, it is no more necessary to plead the evidence. It is no more necessary to plead the evidence for a writ of summons or to a declaration or a bill in equity.

The same rules of pleading apply to a petition in [illegible].

Formerly, after deducting the amount due the Pension Office, and that it was payable at the rate of $30.00 annual appropriation bill, $1200.00 for his position of was abolished by the City Council of Chicago, in its it is sufficient to refer to the allegation that after February 1, 1924, acting as physician was not up-

As to the question that no ordinance of Burning Inspector at the time of his discharge.

was a subterfuge, as there was plenty of work for him as Commissioner, and, also, charge that his final dismissal the allegations dispute the action of the Civil Service employees upon matters changing after a hearing. But, herein of Civil, since it provides for the removal of misconduct by section 12 of the Act to regulate the Civil

It is contended that his suspension was effectually was entitled to the salary for the time mentioned, enough, and it were merely the conclusion that he permitted to work as Boring Inspector. That is allegation ing that time, without any fault on his part, he was not position, December 15, 1924. Nor it is alleged that dur-

368-30221

239 I.A. 677

ELAINE BLACKMAN, and
FANNIE MAY HOLLINGSWORTH,
Appellees,

vs.

WILLIAM BELL and
MRS. WILLIAM BELL,
WILLIAM BELL,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Dec. 23, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 2, 1924, the plaintiffs, Elaine Blackman and Fannie May Hollingsworth, filed a complaint of forcible detainer in the Municipal Court of Chicago, stating that they were entitled to the possession of a hotel situated at 1921 Park Avenue, and that the defendants, William Bell and Mrs. William Bell unlawfully withheld possession thereof.

The defendants were duly served with summons, and on October 15, 1924 there was a trial before the court, without a jury, and a finding that the defendants were guilty of unlawfully withholding from the plaintiffs the possession of the premises described. Judgment, accordingly, was entered that the plaintiffs have and recover from the defendants possession of the premises, and that a writ of restitution issue therefor. This is an appeal by William Bell from that judgment.

It is the theory of the plaintiffs that, although

the defendant, William Bell, had occupied the premises in question under a written lease for a number of years, nevertheless, on May 1, 1924, a subsequent written lease for the same premises was signed and executed by the defendant Emma Bell (Mrs. William Bell), as lessee, and Louis Thexton as lessor; that the new lease was made for a larger rental because the defendants were behind in their rent under the former lease that was outstanding; that on June 6, 1924, the lessor, Louis Thexton, sold the property and the new lease was assigned to the plaintiffs; that on August 18, 1924, a notice was served by the plaintiffs, Blackman and Hollinsworth, the assignees of the new lease, on Mrs. William Bell that the sum of $250.00 for rent was due, and that unless payment was made in five days, the lease would be terminated; that on September 25, 1924, a demand notice for immediate possession of the premises was served on the defendant William Bell, and that, as a result of the cancellation of the lease to William Bell, and the making of the new lease to Mrs. William Bell, and her default in payment of rent thereunder, the plaintiffs were entitled to recover possession of the premises.

On the other hand, it is the theory of the defendant, William Bell, that on April 20, 1922, he leased the premises in question for five years, beginning on May 1, 1922, for a total rent of $9,895.00, payable in weekly sums of $45.00; that on June 20, 1923, another lease was made between Louis Thexton, as lessor, and him, William Bell, as lessee for a term of eighteen months, beginning June 30,1923, and ending on December 31, 1924, for a total rent of

$3,510.00, payable in weekly sums of $45.00; that by that lease he had an option to renew it for a similar period with readjustment of the rent; that by that lease it was, also, provided that an option given him, William Bell, on May 1, 1922, to buy the property for $9,000, should be extended eighteen months; that he was the one who leased the premises, and not his wife; that she had nothing to do with it, that his lease of June, 1933, was still outstanding and the rent all paid up, and, further, that he had an option to purchase, and on August 18, 1934, had tendered $3500 to Thexton to carry out the option contract.

The chief conflict, therefore, is whether the lease of May 1, 1924, signed by Louis Thexton as lessor, and Emma Bell, as lessee, and which was assigned to the plaintiffs, took the place of the former lease and constituted the only title under which Emma Bell and her husband held possession; and whether the rent on that lease was in default.

The lease itself was offered in evidence, and is the ordinary short form printed lease, and is signed by Louis Thexton and Emma Bell. On the back of it there is an assignment, dated June 6, 1924, by Louis Thexton to Perry B. Carr, and an assignment by Perry B. Carr, dated June 7, 1924, to the plaintiffs, Fannie May Hollingsworth and Elaine Blackman.

Mrs. Bell in her testimony does not deny her

signature to the lease. She testified as follows: "He (Thexton) told me that there was going to be a man there, a man there to pay rent to, he was going to change his business into some other man's hands, because he was going to move to Florida, so he wanted me to sign this paper for him, and of course I always trust Dr. Thexton, and I was busy at the time and I signed the paper." She further testified, "He said that he wanted me to sign this paper because he was going to turn it over to another man, and I didn't know until Mr. Blackman come there, that the man was against my husband, I really didn't know what it was, but when I found out that the lease was for me to pay $50.00 then I sent a special delivery to my husband so he wired me back to tell me to pay Thexton's man."

Thexton, the lessor, testified that he saw the defendant, William Bell, and asked him if he could pay the rent that was in arrears, which he, the witness, said was $495.00, but which Bell said was $450.00, and Bell said he could not pay it because he didn't have the money; that he, the witness, asked if it were spread over a couple of months whether Bell could pay it, and Bell said he could, that Bell said "that he had had some work done up at a place in Idlewild, Michigan, that had taken his money, and, therefore, he was behind on his rent, and if I would spread it along and at $5.00 each week, he could pay it;" that he, the witness, then went home that night and made out a lease and brought it down the following morning, and when he presented it to Mr. Bell, the latter said he would not sign it; that Bell said, "You can't collect that $450 from

me because I have no property here, and the stock in the hotel * * * is mortgaged; it was bought on the installment plan," and that he, the witness, then said, "Mr. Bell, I will have to ask you to give me possession of the property, if you won't sign your lease;" that then Mrs. Bell stepped into the office where they were talking, and said, "I don't want to leave this place. My friends are all here. I don't want to go to Michigan I want to stay here, I'm running the hotel and I want to take the lease;" that he, the witness, said, "That will be perfectly satisfactory to me if you wish to do it;" that Mr. Bell said, "All right, if you (Mrs. Bell) wish to take the lease, I will step out;" that Mrs. Bell then signed the lease; that he asked Mr. Bell then to give him his copy of the other lease, and Bell said it was down in his box at the bank, and that he would bring it there tomorrow morning; that he, the witness, then said, "Now, I'm going to tear my lease up;" that he tore it (the old lease) up and threw it in the wastebasket at that time; that when he went back the next morning, Mr. Bell was not there, and he did not get that lease; that at that conversation there were present himself and Mr. and Mrs. Bell. The witness further testified that in a conversation with Mr. Bell, and at Bell's suggestion, he agreed to accept $47.50 instead of $50.00 for each week's rent if he did not have to send a collector to collect it; that they had some discussion about a letter to that effect, and Mrs. Bell said she would be satisfied with it in a letter instead of in the lease; that in the course of the conver-

sation as to whether Mr. Bell was willing to have his wife make a new lease in lieu of the lease with him, Bell said, "it was all right, he supposed she would let him stay there when he came down from Michigan;" that he was going to Michigan; that he had a real estate office in Idlewild; that the increase in the rent in the new lease included the rent that was in arrears on the old lease; that the rent in the former lease was $45.00 per week, and in the new lease, $50.00 per week; that after the new lease was made and the arrangement to deduct $2.50 a week, by reason of not sending a collector, he, the witness, was paid for four weeks at $47.50 a week; that two of those amounts were paid to him personally, and two to Mr. Walduck, whom he had instructed to go down and get it; that the rent which he, the witness, received in those amounts was from Mrs. Bell.

We think that the evidence sufficiently shows that a new and valid lease of the premises was made to Mrs. Bell on May 1, 1924; that a valid cancellation of the prior lease to Mr. Bell was made; and that the lease of May 1, 1924, was duly assigned to the plaintiffs on June 6, 1924, nearly four months before the suit in forcible detainer was begun. These facts, we assume, were found by the trial judge, who entered judgment for the plaintiffs, and we do not feel justified in holding that such findings were contrary to the manifest weight of the evidence. The new lease was signed by her and she admits that the first payment she made thereon was $47.50, which is consistent

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with the testimony of Thexton, and which amount is more than that provided for in the prior lease. She, also, admits that the first time she paid Blackman (the agent), she paid him $50.00, although she knew that the former lease only called for $45.00; and that she paid him $50.00 thereafter. Thexton testified that he had received no rent since June 1. Woolphy, an agent for the plaintiffs, testified that on June 6 or 7, he told Mrs. Bell the property had been sold and that the plaintiffs would be entitled to rent after that date; that Mrs. Bell said she was only supposed to pay $47.50, but that he told her the lease said $50.00, and that after that she paid $50.00.

The evidence shows that on August 18, 1924, the plaintiffs served a five day notice on Mrs. Bell for default in payment of $250.00 rent; and that on September 25, 1924, a written demand for immediate possession was served on Mr. Bell.

Inasmuch as Mr. Bell, alone, has appealed from the judgment, the only question is whether the judgment as to him ought to stand. Holding, as we do, that the lease of May 1, 1924, to Mrs. Bell, to which he was not a party, was the only lease under which he could claim any right to possession, the prior lease to him having been cancelled, it follows that he had lost all right to possession and that the judgment must stand. Although considerable evidence was introduced concerning various amounts of rent that were paid by him after May 1, 1924, in the view we take of the case, it is immaterial. But even if it were material, we think

the evidence sufficiently shows that Mrs. Bell was in default when notice was served on her. Woolphy testified that there was $250.00 due from July 14 to the date of the notice, and that it was unpaid.

The evidence shows that after August 18, 1924, some payments, by check, were made by William Bell to Thexton, but it is not shown that they were for rent that accrued to the plaintiffs after August 18, 1924. It follows, therefore, that there is no evidence to disprove the testimony of Woolphy that Mrs. Bell was in default when the notice was served. Thexton was apparently treating them as payments by Bell on the arrears of his rent which had accumulated before the property was sold. It may be that, under the lease, Thexton was not entitled to receive such payments when they were made, but that cannot affect the rights of these plaintiffs.

The claim of Mr. Bell is that the lease of May 1, 1924, never existed. He does not claim, therefore, that any rent was paid thereunder. Nor does he claim that he was not given proper notice to quit. Of course, the plaintiffs, as assignees of the lease of May 1, 1924, had the right to maintain forcible detainer against the lessee, Mrs. Bell, and any one in possession through or under her. If he was unlawfully in possession, the judgment, therefore, was proper. FitzAllan Woodbury v. H.H. Rysl, Executor, 138 Ill App. 459.

There is evidence that in the course of the dealings between William Bell and Thexton, prior to May 1,

1924, Bell had been given an option to buy the premises at a certain figure, and that on August, 19, 1924, he tendered $2500.00 to Thexton on the option to buy, which Thexton refused. That, however, involves matters which are not competent here. It is the law that in forcible detainer the court considers only the strict legal rights, and not the equities of the parties. O'Brien v. O'Brien, et al., 195 Ill. App. 348, and that a landlord need only establish his right to possession of the property. Ladd v. Ladd, 168 Ill. App. 302.

Considering, therefore, what the evidence shows in regard to the lease of May 1, 1924, to Mrs. Bell, and concerning the cancellation of the prior lease to William Bell, and as to notice and rent due, and that William Bell alone brings this appeal, we do not feel justified in overriding the finding of the learned trial judge.

The judgment, therefore, will be affirmed.

AFFIRMED

THOMSON, P. J. and
O'CONNOR, J. concur.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

239 I.A. 677

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On NOV 14 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7484 October Term, 1925. Agenda 2.

Robert Jeske,

appellant,

vs.

Lake County Publishing and Printing Company, a corporation,

appellee,

Appeal from the Circuit Court of Lake County.

239 I.A. 677

PARTLOW, J.

Appellant, Robert Jeske, began suit for libel in the Circuit Court of Lake County against appellee, Lake County Publishing and Printing Company. There was a trial by jury, a verdict and judgment in favor of appellee and this appeal was prosecuted.

Appellee owned and published a newspaper called "The Waukegan Daily Sun and The Waukegan Daily Gazette". On December 12, 1923, the following article was published by appellee;-

"ALLY OF 'A. V.' IS INDICTED
ACTION CAUSES FLURRY IN SMITH'S CAMP

REPORT ROBERT JESKE, OPERATIVE OUT OF SMITH'S OFFICE ONCE, INDICTED.

A. V. FIXED BONDS, REPORT.

Robert Jeske, well remembered throughout the county as an employe of State's Attorney A. V. Smith, was indicted Tuesday by the Kane County grand jury, according to news dispatches from Aurora.

The reports are he was indicted on two counts, one a statutory charge and the other a hold-up charge. The bonds were fixed at $5,000. and $2,000, the reports state.

A. V., who can be said to be loyal to his pals in politics, was instrumental in fixing the original bonds.

Back in July Jeske was arrested on a charge of holding up a colored youngster in Aurora. With him at the time was an alleged prohibition agent by the name of Willis. Both were accused by Aurora police with being drunk.

Jeske had a star that indicated that he was with the Brundage forces at the time. When a cohort of Eddie, by the name of William Clausen, was interviewed he denied that Jeske worked for them.

When in October came a complaint from two girls, Florence Davis and Mabel Pennock, that they had been attacked by Jeske. It was on their testimony that he was indicted, the report stated.

October Term, 1928. Agenda .

Appeal from the Circuit Court

of Lake County.

2391 A. 677

Appellee.

Robert Jeske, began suit for libel in the Circuit

Company. There was a trial by jury, a verdict and judgment

of appellee and this appeal was prosecuted.

owned and published a newspaper called "The

and The Waukegan Daily Gazette". On December 12, 1927,

article was published by appellee:-

"ALLEY OF 'A. V.' IS INDICTED
ACTION CAUSES FLURRY IN SMITH'S
CAMP

BOND, O

BONDS, REPORT.

Jeske, well remembered throughout the county as an employe
Attorney A. V. Smith, was indicted Tuesday by the Lake
jury, according to news dispatches from Waukegan.

are be was indicted on two counts, one a statutory
the other a hold-up charge. The bonds were fixed at
and $2,000, the reports state.

who can be said to be loyal to his pals in politics,
sentimental in fixing the original bonds.

July Jeske was arrested on a charge of holding up a
youngster in Aurora. With him at the time was an alleged
accomplice on the name of Willie. Both were accused by
police with being drunk.

had a shot that he was with the Brundage
the time. Then a cohort of Eddie, by the name of William
was interviewed he denied that Jeske worked for them.

October came a complaint from two girls, Florence Davis
Lennock, that they had been attacked by Jeske. It was
testimony that he was indicted, the report stated.

Jeske is not popular in the lake region. He was one of the men who obtained the evidence against Jack O'Connor, of 'Blarney Isle,' located in Grass Lake, that made the expensive rum trial possible. A. V. took a bad beating in this legal conflict.

He last obtained the evidence against Ray Pregenzer of Grass Lake. This is one of the cases that A. V. won."

On December 14, 1925, another article was published by appellee as follows;-

" 'A. V.'S' BLUNDER WORRIES KANE CO.
AND ED BRUNDAGE

OUR VEST POCKET EDITION OF VOLSTEAD TRIPS TO AURORA ORRY.

JESKE STILL IN JAIL.

Armed with an extra clean collar and a worried countenance our own A. V. Smith tumbled off the choochoo at Aurora Thursday to iron out a little more grief.

Charles Abbott, prosecutor of Kane County, with offices at Geneva, is said to have been the objective of his mission.

The greeting must have been pathetic. Charlie and Ashbel, both friends of Eddie Brundage, seem worried over the fate of Robert Jeske and Willie, two McQueeny detective agency operatives, who were indicted by the Kane county grand jury on two charges.

Both of them are in custody with bonds of $5,000 and $2,000 keeping them from booze sleuthing activities. The charges are a hold-up and a statutory offense.

A.V., the central figure in the Gov. Small 'fixing' case that deft him with an adverse verdict and the county with a flock of bills, recommended Jeske and the McQueeny organization to Abbott, according to information from Aurora.

Then Jeske and Willis were caught drunk and charged with holding up a youthful negro by Aurora police. Their indictment followed plus an added charge of attacking two Aurora girls.

It is not known whether Eddie, crawled into the office for the post mortem Thursday, but it was learned that full information of the affair had been given to his office.

Continued rumors sweeping through Kane County are to the effect that A. V.would like to see the matter nolle prossed.

If this is the case Abbott is placed in some of the troubles that our own A. V. has bathed in for the past few months. A contagion of grief seems to have spread over the Brundage ballott markers like a plague.

Just how such a case can be nolle prossed after a grand jury has voted indictments on such serious charges is a matter that would worry far more agile minds that A. V., Charlie and Eddie.

Just where the conference ended is not known. The press was not invited to attend and expressions of fear mingled with blushes when attempts were made at interviews.

Any sort of a prophet can predict plenty of political obituaries for the next few months."

On December 17, 1923, appellee published the following article which it calls a retraction.

" SOMEBODY LIED IN GIVING FACTS ON
TESKE MATTER.

IT DEVELOPS THAT THE SUN WAS 'FRAMED' BY NON-EXISTENT
REPORTER FOR AURORA STAR.

BLACKMAIL MOTIVE SEEN.

Once, and that was a long time ago, a good friend of the Sun called over the telephone.

'I'm the father of twins, congratulate me,' came the voice.

The Sun did. They did it in print. It was a little story. A little part of a day's work, and such a small atom that a short time should erase it from every memory. But the memory of those few lines is as permanent fixture around the office as the printers' devil.

For the mother of the twins came in the next morning when the janitor unlocked the door. What she told the editor about news is also a memory around the Sun office * * * but not a cherished one. As far as is known she is still motherless.

'I did it for a joke,' the would-be father explained the following day.

THE TESKE CASE.

The second crucifixion of the minimum of courtesy that can be shown to any newspaper occurred to us last week. The Sun was 'framed' and beautifully so.

It was another piece of telephone work. The informant addressed himself as H. A. Andrews of the Aurora Star. He stated he was a good friend of a Mr. Townsend, who in turn was a friend of Editor W. J. Smith.

The bit of news he had to offer came as a "Courtesy to Mr. Townsend's friendship for Mr. Smith,' according to the way 'Andrews' explained it.

The call, accepted by the girls who answer the telephone, was seemingly from Aurora and for the editor. He was in Florida. A reporter served in his stead.

'Andrews', with a well jointed story related that 'Robert Jeske and a man named Willis had been indicted by the Kane County grand jury on a statutory and hold-up charge.

He told how A. V. Smith, who once had Jeske in his employ, had arranged for their bonds when taken by the Aurora police a few months back. The bonds, according to his story, were $5,000 and $2,000 in each instance for the charges.

The Sun force, with the memory of the Judas of the Twins pushed in a far nook of the mind, used the story believing it true on the assumption that nobody would bother to send in a long distance call without a reason for doing so and we then did not detect the 'reason.'

Came the voice of the obliging Mr. Andrews over the phone a few days later from Aurora. He 'had something more that might interest Mr. Smith, who by the way was a good friend of Mr. Townsend, who was a good friend of his.'

Mr. Andrews had 'seen a letter in the office of State's Attorney Abbott at Geneva from A. V. Smith recommending the McQueeny Detective Agency.'

His bright eyes had also 'seen Smith in Aurora with the Kane County prosecutor' and he had 'reliable, unwarped, good-to-the-end information that they were trying to have the 'indictments' against the two operatives quashed.' Both were still in jail, according to his story. Graciously he declined the pay offered as a reporter sending in a story from another city which is a custom as old as the newspaper game.

And Editor Smith, having returned from Florida that day, scratching his head, tried to the best of his ability to recall Townsend, but failed to place him exactly. He was almost positive he knew Andrews, however, because a man by that name used to be a city editor in Waukegan some years ago.

Coupled 'Em Up.

Former Mayor Townsend of Aurora now holds a state position - and the theory now is that the 'framer' took it for granted that the editor of the Sun, by being a state official probably would know Townsend and accept his connection with the case as sufficient to make it sound reliable.

It is easy to see through now. A cub reporter should have 'smelled a rat' at the first call after the shock of the hoax. But now isn't then, and the Sun printed the second story in good faith.

It was beautifully 'framed.'

But like the attorney for the defense who could have the last say to the jury if it wasn't for the laws demanding that the state address them last, the Sun will have to put it before the jury of subscribers next to last.

An Andrews Found.

'H. A. Andrews' is perfect in his line in every way. He does, and will rank high above the Judas of the Twins in the memory of the Sun office long after the crowds have said, 'How natural' over every one of the present force.

A flesh and blood Andrews at the Aurora Star was located over the telephone late Saturday. He 'never' knew Townsend or W. J. Smith. He didn't cover Courts and never heard of Jeske, Willis, Attorney Smith or McQueeny.'

Judging by developments, Jeske was done an injustice through these false reports, and the Sun regrets the fact that it had anything to do with reflecting on him where such reflection was not in accordance with the facts. However, it is a known fact that Jeske has been in the employ of A. V. Smith through the McQueeny Detective Agency. He worked on the Ray Pregenzer and Jack O'Connor booze cases as an operative of the McQueeny bureau, which was then, as court records will show, in the employ of the state.

Jeske and Willis were also arrested by Aurora police, according to a lengthy article in the Aurora Beacon in July and according to

Complied 'Em Up.

Mayor Townsend of Aurora now holds a staple position - and the Sun, by being a staple official probably would know it sooner now is that the 'Tremor' took it for granted that the editor of the Sun, by being a staple official probably would know it sooner and accept his connection with the case as sufficient to make it sound reliable.

It is easy to see through now. A cub reporter should have 'smelled a rat' at the first call after the shock of the boom. But now isn't then, and the Sun printed the second story in good faith.

It was beautifully 'framed.'

Just like the attorney for the defense who could have the last say in the jury if it wasn't for the laws demanding that the state address first, the Sun will have to put it before the jury of subscribers to test it.

An Andrews Bound.

'T. A. Andrews' is perfect in his line in every way. He does, still rank high above the Twins in the memory of the old office long after the crowds have said, 'Now mermal' over many one of the present force.

A fresh and blood Andrews at the Aurora Star was located over the telephone late Saturday. He 'never' knew Townsend ok... 7. mail. He didn't cover Courts and never heard of Teske, Willis, Smith or McQueeny.'

By development, Teske was done an injustice through false reports, and the Sun regrets the fact that it had any- to do with reflecting on him where such reflection was not in accordance with the facts. However, it is a known fact that Teske has been in the employ of A. V. Smith through the McQueeny Chautauqua Agency. He worked on the Hay Preserver and Jack O'Connor as an operative of the McQueeny bureau, which was then, we recall, will show, in the employ of the state.

Willis were also arrested by Aurora police, accord- ing to a Saturday article in the Aurora Beacon in July and accord-

the voice of the obliging Mr. Andrews over the phone a [illegible] later from Aurora. He 'had something more that might interest Mr. Smith, who by the way was a good friend of Mr. Townsend, [illegible] good friend of his.'

Andrews had 'seen a letter in the office of State's Attorney [illegible] Smith [illegible] Queeny De- [illegible].'

Right eyes had also 'seen Smith in Aurora with the Vane [illegible] description' and he had 'reliable, unsworn, good-to-the-end information that they were trying to have the 'indictments' against the operatives quashed.' Both were still in jail, according to the story. Graciously he declined the pay offered as a reporter [illegible] in a story from another city which is a custom as old as the newspaper game.

The Editor Smith, having returned from Florida that day, accepted- [illegible] tried to the best of his ability to recall Townsend, [illegible] to place him exactly. He was almost positive he knew Townsend, however, because a man by that name used to be a city [illegible] a Wenkegan some years ago.

the statement Jeske made to a Sun reporter in the Sun office several months ago when Jeske had the occasion to look through the files of the Sun. The charge was holding up a negro lad, according to Jeske and the Beacon.

Jeske Explains to Reporter.

Jeske also stated that he and another man had been charged with attacking two girls in Kane County at the same time he discussed the other case with the Sun reporter.

But the statements that indictments were returned were untrue.

'Andrews' also brought out these points in the course of the conversation over the phone, which led employes of the Sun to believe, after discussing the story when it had been received, that it was all wool and a yard - yes, make it two yards - wide.

If anyone has suffered through the misrepresentation that came through the information supplied by 'Andrews' the Sun is sorry. A greater injury has been done the men and women who serve on this force and make the Sun what it is.

There will be more 'Andrews' and more 'twins' in any newspaper in any city * * * these lepers come in every lifetime.

The question is: 'Who assumed the role of Andrews?'

Was it a detective agency?

Was it a Waukegan newspaper?

Did the state's attorney's office of Lake County have cognizance of the effort made to put the Sun in position where grounds could be found to 'come back at it'?

If Jeske and Willis have been wronged by the Sun's statements, we are very sorry. It appears that somebody 'framed' us and we refuse to accept the suggestion of some folks that Jeske and Willis themselves were a part of it in order to build up a case for damages against the Sun. Respectable detectives wouldn't do that - and we have known McQueeny too long to think he would condone such a thing.

But, somebody did it - and we hope they had a good time doing it.

Therefore as the Chicago paper says in its daily apology column: 'We apologize to all referred to in the articles in all statements made, statements which we now recognize as having been faked for a sinister purpose.'

Another theory of the hoax is that enemies of Jeske and Willis at Aurora, where the two men have been in booze raids, were attempting to injure them. Whoever it was, was familiar with the 'law of the land.' They knew that the editor was out of the city and called for him just to ward off suspicion, linked the name of Townsend.

As reporters for the Sun frequently call up other newspapers in Illinois and Wisconsin to give them news, the reporter naturally thought that the information coming from Aurora was authentic, especially in view of the fact that the person gave the name of the Aurora newspaperman."

statement Teeke made to a Sun reporter in the Sun office several months ago when Teeke had the occasion to look through the files of the Sun. The charge was holding up a Negro lad, according to [illegible] and the Beacon.

Teeke Explains to Reporter.

Teeke also stated that he and another man had been charged with stealing two girls in Kane County at the same time he discussed the other case with the Sun reporter.

Both the statements that Indictments were returned were untrue.

'Andrews' also brought out these points in the course of the conversation over the phone, which led employes of the Sun to believe, after discussing the story when it had been received, that [illegible] wool and a yard - yes, make it two yards - wide.

It [illegible] has suffered through the misrepresentation that came through the information supplied by 'Andrews' the Sun is sorry. Whatever injury has been done the men and women who serve on this [illegible] and make the Sun what it is.

There will be more 'Andrews' and more 'twins' in any newspaper [illegible] city * * * these lepers come in every lifetime.

[illegible] a detective agency?

[illegible] a Michigan newspaper?

[illegible] the state's attorney's office of Lake County have sought [illegible] the effort made to put the Sun in position where grounds could be found to 'come back at it'?

If Teeke and Willis have been wronged by the Sun's statements, we are very sorry. It appears that somebody 'framed' us and we [illegible] accept the suggestion of some fella that Teeke and Willis themselves were a part of it in order to build up a case for damages against the Sun. Reasonable detectives wouldn't do that - and we [illegible] Modjeska too long to think he would condone such a thing.

But, somebody did it - and we hope they had a good time doing it.

Therefore as the Chicago Tribune says in its daily apology or whatever it is, we apologize to all referred to in the articles in all statements which we now recognize as having been failed for a [illegible] purpose.'

Another theory of the hoax is that enemies of Teeke and Willis / [illegible] where the two men have been in goose reids, were attempting to injure them. However it was, was familiar with the 'law of the land.' They knew that the editor was out of the city and called [illegible] just to ward off suspicion, linked the name of Townsend.

[illegible] reporters for the Sun frequently call up other newspapers in [illegible] and Waconda to give them news, the reporter naturally [illegible] that the information coming from Aurora was authentic, especially in view of the fact that the person gave the name of the [illegible] man.

The evidence shows that appellant was 25 years old and resided with his wife and child in Chicago. For about six years he had been employed by the McQueeny Investigating Agency of Chicago, and for about two-thirds of that time he had been working for State's Attorney Smith of Lake County and former State's Attorney Welch, investigating violations of the prohibition law. He had also been employed by other lawyers in Lake County on other cases, and by the corporation counsel of Aurora. He was never under indictment at Aurora in Kane County, was never in jail in that county under an indictment, and State's Attorney Smith did not go to Kane County for the purpose of obtaining bail for him, or to get the indictment nollied.

Spencer Jorgenson, the reporter of appellee who wrote the two articles set out in the declaration, was called as a witness by appellee and testified that on September 29, 1923, he had a conversation with appellant in appellee's office in which he asked appellant how everything was going and appellant replied "fine." The witness then asked appellant how a case of appellant's was coming out at Aurora and appellant stated that that case was nothing to what he had to face; that he was charged with attacking two girls but he believed it was a frame up, but it would go before the grand jury. The witness also testified to another conversation on October 10, or 12, with appellant, in which the witness asked appellant how he was coming out in Aurora ~~dne~~ and appellant replied that he did not know; that the grand jury would meet in about a week. These conversations were denied by appellant. Two police officers of Aurora, testified that the appellant had been arrested in Aurora in September, 1923, while he was employed there as a detective by the corporation counsel to investigate violations of the liquor laws; that at the time of his arrest he was intoxicated; that he was released without any charges having been preferred against him; that appellant was not brought to trial because the corporation counsel had employed him to investigate some moonshine cases; that the corporation counsel ordered him discharged.

All of this evidence was objected to by appellant and its admission is assigned as error. The only plea filed by appellee was

the plea of not guilty. This plea admitted the falsity of the libel charged in the declaration. There was no plea of justification, and for that reason no evidence was admissible to prove, or to attempt to prove a justification. Under the plea filed appellant was limited to evidence tending to prove that it did not publish the libel, and to evidence in mitigation of damages. The damages could be mitigated in two ways, first by showing the general bad reputation of the appellant, and second, by proving facts which tend to disprove malice, but which did not prove or tend to prove the truth of the charge. Bad general reputation could not be established by proof of specific facts tending to show general bad reputation, but the evidence was limited to the general reputation. Evidence in mitigation of damages which tends to prove appellant's guilt or even cast suspicion of guilt upon him was not admissible under these pleas. Proof of guilt, or proof tending to show guilt, could only be proven under a plea of justification. Owen vs. McKean, 14 Ill. 458; Sheahan vs. Collins, 20 Ill. 326; Thomas vs. Danaway, 30 Ill. 373; The Spolek Denni Hlasatel vs. Aloisie Hoffman, 204 Ill. 532; Commercial-News vs. Beard, 115 Ill. App. 501; Reedes vs. Roth, 179 Ill. App. 95; O'Malley vs. Illinois Publishing & Printing Co. 194 Ill. App. 544.

In Young vs. Bennett, 4 Scam. 43, it was held that in an action for slander in charging the plaintiff with stealing, it was not admissible for the defendant to prove, under the general issue, in mitigation of damages, that there was a report in the neighborhood of the plaintiff that he had been guilty of stealing from the defendant. In Regnier vs. Cabot, 2 Gil. 54, it was said: "Whether a party under the general issue in an action of slander can be permitted to show, in mitigation of damages, specific facts which would tend to cast suspicion of guilt upon the plaintiff, is the question upon which heretofore there has been some conflict of authorities. The current, however, of the more recent decisions is strongly against the doctrine, and in some of the very few cases where it has been held that the defendant had this right, the

judges themselves, who admitted the correctness of the principle, acknowledged that it was unsupported by sound reason and good sense." * * * "The rule of law as applicable to this question seems, by the weight of authority, now to be, that where a defendant does not justify, he may mitigate damages in two ways only, first, by showing the general bad character of the plaintiff, and second, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge." In Sheahan vs. Collins, 20 Ill. 325, on page 328, the court said: "It seems to be the doctrine that a defendant in an action for slander or libel may mitigate damages in two ways, First, by showing the general bad character of the plaintiff, and second, by proving any facts which tend to disprove malice, but which do not tend to prove the truth of the charge. Its truth can only be shown under a plea of justification, and hence any evidence tending to show its truth, would be in violation of the rule." In O'Malley v. Illinois Publishing & Printing Co., 194 Ill. App. 544, on page 555, it was said: "The evidence claimed to be proper to be considered in mitigation of damages violated the rule that evidence tending to cast suspicion of guilt upon the party libeled cannot be considered by the jury in mitigation of damages. Such evidence was all aimed at an attempt to justify the truth of the libel, and consequently failed of its intended purpose."

The evidence of these three witnesses, under the pleadings, could only be admitted upon the theory that it was in mitigation of damages. Its only effect was to prove or tend to prove the libel charged in the declaration. Even if the evidence tended to show mitigation of damages, it would not be admissible if it tended to cast suspicion on appellant. It was not proper tp prove under the plea of not guilty that appellant had been drunk, had been arrested, or had been in trouble with girls in Aurora. This evidence was highly prejudicial and deprived appellant of a fair and impartial trial. Appellee attempts to justify the admission of this evidence upon the theory that it tended to establish a conspiracy on the

part of appellant to induce appellee to publish these libels, but we do not think it was admissible for that purpose, as it could only be shown under a plea of justification.

The court, over the objection of appellant, admitted in evidence the article published by appellee under date of December 17, 1923, which was evidently intended as a retraction of the charges made in the two libelous articles; together with evidence of Jorgenson relative to conversations which he claims to have had with a man by the name of Andrews, which were made the basis of the libelous articles. Appellant contends that the admission of all of this evidence was erroneous; that the retraction did not come within the rules of law with reference to retractions; that it was not given the same or equal prominence in the newspaper as the alleged libel; that in the head lines and in the body of the alleged retraction the name of appellant was spelled Teske; that the retraction was evidently not intended as a retraction of the wrong done appellant but was intended to cast suspicion upon him and to further libel him; that the retraction should not be considered in mitigation of damages for the reason that it was in fact an aggravation of damages; that it reiterated the libel by reciting the fact that appellant and Willis were arrested by the Aurora police according to a lengthy article in the Aurora Beacon, in July, on the charge of holding up a negro lad, and that appellant had also stated that he had been charged with attacking two girls in Kane county, and that he discussed the other case with the reporters, which statements were not competent under the pleadings.

In cases of this kind retractions are admissible in evidence in mitigation of damages. The publication of a retraction which the injured person acknowledges to be satisfactory, is not an accord and satisfaction, nor a release of damage without an express agreement to that effect, Storey v. Wallace, 60 Ill. 51; 18 Am. and Eng. Ency. of Law, 1075. To be admissible, even in mitigation of damages, the retraction must be fully, fairly and promptly made, it should contain an admission of the incorrectness of the defamation, and evidence a

part of appellant to induce appellee to publish those libels, but we do not think it was admissible for that purpose, as it could only be given weight upon a plea of justification.

The court, over the objection of appellee, admitted in evidence the article published by appellee under date of December 17, 1932, which was evidently intended as a retraction of the libelous matter. The two libelous articles, however, left matters in such a condition as to require, upon that point, a jury to say whether the retraction was sufficient to meet the demands of the statute. Under the facts of this case, we think the question was properly left to the jury. Appellee contends that the retraction did not come within the time of the statute, but if the libelous matter was published on a publication day of the paper, the retraction appeared in the next issue and in the body of the matter containing the name of appellant, who was libeled therein, that the retraction was published on a publication day of the paper, and that appellant did not claim that he had been damaged by the publication after the retraction appeared. The question of damages was properly left to the jury in accordance with the instructions of the court, and that appellant did also claim that he had been damaged by the publication of the libelous matter in the Jasper Banner, in 1919, as the result of which two girls in Lamb county, and that he discussed the libel with the reporters, which statements were not competent under the pleadings.

In none of the four instances are the statements in question [illegible] the publication of a libelous matter [illegible] mere repetition, [illegible] Mich. 176; Shorey v. Wallace, 60 Ill. 61; 19 Am. and Eng. Ency. [illegible] 1919. [illegible] admissible, even in mitigation of damages, the

desire to repair the wrong occasioned by the publication. It must be an absolute and unambiguous denial of all of the material parts of the defamation. 25 Cyc. 424; 37 Corpus Juris, 124. In 17 R.C.L. 328, the rule is stated as follows;- "it must be of such a nature, and published in such a manner, as to manifest an honest intention to repair the harm done to the injured reputation. The reparation to the defamed person must not be colorable. The defendant should admit that the charge was unfounded, that it was made without information, under an entire misapprehension of the real facts, and that he regrets that it was published." In the early case of Owen vs. McKean, 14 Ill. 459, on page 460, the court said:- "The case of Hotchkiss vs. Oliphant, 2 Hill. 515, goes much further in an obiter dictum, than any case I have met, allowing a retraction to be shown in mitigation. When this is the effect of true penitence for the injury inflicted, and intended as an honorable reparation, and so immediate as to become a part of the res gestae, I see no objection to it. An honorable mind could have as little objection to receiving a like genuine reparation offered upon greater delay, and mature reflection and deliberation; but at the same time it is liable to the suspicion of pharisaical repentance intended more for his own protection than for reparation to the victim of his calumny; and should, therefore, be freed from all suspicion of this character before it would be entitled to any consideration as evidence of a desire to make reparation for an injury." In Storey v. Wallace, 60 Ill. 51, on page 57, the court said:- "Here was a cruel libel published merely to make a paragraph. Here was an explanation so published as to show that the persons having the matter in charge thought it of no moment that the retraction should receive the same publicity as the libel, though the latter had outraged the sensibilities and sullied the character of an innocent and unoffending woman."

The question is whether the so-called retraction was such as to entitle it to admission in evidence under the rules of law above

announced. In some respects it comes within the rules, but in other respects it violates those rules, and we think that, taken as a whole, it was not admissible in evidence. Part of its heading is:- "It develops that the Sun was framed by non-existent reporter for Aurora Star." "Blackmail Motive Seen." It is left to the conjecture of the reader as to who framed the case, and who was guilty of the blackmail, whether it was appellant, or someone for him, or some stranger. The article then refers to the conversation with Andrews over the telephone, and then says: "Judging by developments, Jeske was done an injustice through these false reports and the Sun regrets the fact that it had anything to do with reflecting on him when such reflection was not in accordance with the facts." The regret expressed is that appellee had anything to do with reflecting on him but only to such injury as was not justified by the facts. Under the pleadings no facts in justification were admissible in evidence, and as the retraction goes only to such injury as was not justified by the facts, therefore the retraction was not an absolute and unambiguous denial of all of the material parts of the defamation. The article then proceeded to reiterate the charge that Jeske and Willis were arrested by the Aurora police for holding up a negro lad and that Jeske had stated that he and another man had been charged with attacking two girls in Kane County. We have held that evidence of these facts was not admissible on the trial under the pleadings. If evidence of these facts was not admissible on the trial under the pleadings it must follow that a substantial reiteration of these charges, or the making of new charges of criminal offenses, were not admissible in a so-called retraction which was supposed to be published to redress the wrong done appellant. It is then stated that "if anyone has suffered through the misrepresentation that came through the information supplied by Andrews, the Sun is Sorry". At another place it says:- "If Jeske and Willis have been wronged by the Sun's statement, we are sorry." The articles complained of in the declaration were libelous per se, their falsity

was admitted under the pleadings, therefore there was some damage to appellant. By the last statements there is some doubt expressed as to whether any damage had been occasioned. This was not in accord with the rule of law applicable to retractions. Other statements might be pointed out where the retraction did not come within the rules governing retraction, but those already cited are sufficient to show that the retraction was not properly admitted in evidence.

The third instruction given on behalf of appellee, told the jury that if they believed from the evidence that Jeske, by misrepresentations, led the defendant to publish the libel, and induced it to publish the same, they should find the defendant not guilty. The whole theory of appellee's defense was that appellant, or someone for him, on December 11, phoned to appellee the facts contained in the articles of December 12 and 14, and that as the facts were substantially the same as the conversation between Jeske and Jorgenson, that this evidence tended to show that either appellant or some one for him framed a case against appellee and induced appellee to publish these articles, and that the evidence of the conversation between appellant and Jorgenson was not for the purpose of tending to establish the guilt of appellant or to cast suspicion upon him, but was for the purpose of showing that a conspiracy was entered into by appellant or some one for him to frame a case against appellee and induce appellee to publish the article as the basis of a libel suit for damages.

On this point, the evidence shows that the conversations between appellant and Jorgenson testified to by Jorgenson were not at the solicitation of appellant. Appellant did not volunteer those conversations, but if the statements were made by appellant they were in response to questions of Jorgenson. Appellant went to appellee's office to look at some files and while he was there Jorgenson made it his business to open the conversation and ask the questions. The second conversation was on the street and at that time Jorgenson interrogated appellant. These conversations

are made the basis of the alleged talk with Andrews which resulted in the publishing of the libels. There is no proof, except inference, as to any connection between the two incidents. We have held that the conversations between appellant and Jorgenson were improper, and we are of the opinion that the conversations between Jorgenson and Andrews were also improper. If none of these conversations were properly admitted in evidence, it follows that the third instruction given on behalf of appellee should not have been given for the reason that there was no proper evidence on which to base it.

The first instruction, refused on behalf of appellant, was as follows: "The court instructs the jury that the retraction of a libel is not to be considered as a defense to an action based upon such libel but only in mitigation of damages, and if the jury believe from the evidence that the article printed in the Waukegan Daily Sun, under date of December 17, 1923, was published more to protect the interests of the defendant than to repair the wrong done to the plaintiff, then they should consider it accordingly in determining what, if any, effect it should be given in mitigation of damages." Error is assigned by appellant for the refusal of this instruction. In the first instance it was a question of law for the court to determine whether the retraction should be admitted in evidence. 17 R.C.L. 328. If it was admissible in evidence then it was the duty of the jury to consider it in mitigation of damages. If it was published more to protect the appellee than to repair the wrong done appellant, then the court should not have admitted it. Its admission was a question for the court and not for the jury, and for that reason the court properly refused to give this first instruction.

The second instruction refused was covered by the second and seventh given, and the fifth refused instruction was covered substantially by others given. Complaint is made of other instructions, but as they are not argued we will not consider them.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6th day of June in the year of our Lord one thousand nine hundred and twenty-one.

Justus L. Johnson

Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

239 I.A. 677

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 5 1925

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7537 Agenda 21

OCTOBER TERM A.D. 1925.

People of the State of
Illinois,

Defendant-in-error,

vs.

Wilbur P. Stattler,

Plaintiff-in-error.

239 I. A. 677

Error to the County
Court of Carroll County.

Jett, J.

This is a prosecution against Wilbur P. Stattler, plaintiff in error, for an alleged violation of the Prohibition Law. Plaintiff in error was indicted by the grand jury of Carroll County. The indictment contains nine counts and all charge a violation of the law by the selling of intoxicating liquor. Each count of the indictment is in the same language except the date on which the liquor is alleged to have been sold. The cause was transferred to the county court for trial.

On March 31, 1925 a motion was made to quash the indictment which motion was by the court denied. On May 11, 1925, a jury trial was had. On the evening of that day after the jury had retired ~~it was~~ it was agreed by the court and counsel that if the jury failed to agree upon a verdict before ten P. M. and arrived at a verdict after that time, the jury might return into court a sealed verdict. The jury did return a sealed verdict and went to their respective homes. On the morning of May 12, 1925 the jury not being present the court opened the verdict which is as follows: "We the jury find the defendant guilty in manner and form as charged in the two counts of the indictment." The court thereupon called into court the states attorney and one of the attorneys for the defendant. Two days after the verdict was returned the jury was reconvened and under the directions of the court returned another verdict finding the

Amanda 23

OCTOBER TERM A.D. 1929.

2391 A. 677

Error to the County

Court of Carroll County.

June 3.

This is a prosecution against Wilbur P. Stahler, plaintiff in error, for an alleged violation of the Prohibition law. Plaintiff in error was indicted by the grand jury of Carroll County. The indictment contains nine counts, each charging a different sale by the selling of intoxicating liquor. Each count of the indictment is in the same language except as to the date on which the liquor is charged to have been sold. The cause was transferred to the county court for trial.

On March 31, 1928 a motion was made to quash the indictment which motion was by the court denied. On May 11, 1928, a jury trial was had. On the [illegible] the jury not being present the court [illegible] the jury might return into court a sealed verdict. The jury did return a sealed verdict and went to their respective homes. On the morning of May 12, 1928 the jury not being present the court opened the verdict which is as follows: "We the jury find the defendant guilty in manner and form as charged in the two counts of the indictment." The court thereupon called into court the attorney and one of the attorneys for the defendant. Two days after the verdict was returned the jury was reconvened and under the

plaintiff in error guilty on the eighth and ninth counts. No motion for a new trial was made but the court informed the plaintiff in error that if he would make a motion for a new trial it would be granted. A motion in arrest of judgment was made and overruled and thereupon the court sentenced the plaintiff in error to pay a fine and to imprisonment in the county jail of Carroll County.

A reversal of this cause is sought because (1) of the error of the court in reconvening the jury after it had brought in a verdict and the same had been opened and read by the court and recorded by the clerk thereof; (2) for the reason that the jury had been discharged and could not be reconvened to consider the case; (3) because the verdict being void the court could not enter a valid judgment on said verdict; and (4) the instruction given by the court to the jury after it had been reconvened was erroneous, that it amounts to a peremptory instruction by directing the jury to find the plaintiff in error guilty on some two specific counts of the indictment.

The question involved in this proceeding was recently passed upon by this court in the case of the People vs. Wiborg, General Number 7179 decided on August 13,,1923. We there held that the practice of reconvening a jury as was done in the instant case was too loose to be tolerated and that a verdict thus rendered could not be sustained.

In People vs. Tenbrook, 194 Ill. App. 14-16, the court made a similar ruling.

It is unnecessary to further discuss this case for the reason that the question presented here has been discussed by this and other courts until at this day there is no doubt about the rule. The County Court of Carroll County erred in denying the motion in arrest of judgment. The judgment of the County Court of Carroll County is therefore reversed and remanded.

Reversed and Remanded.

Reversed and Remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6th day of Jan. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

239 I.A. 677

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 7 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,

Defendant in error,

vs.

Albert Provenzano,

Plaintiff in error.

Error to the County Court of Winnebago County.

239 I.A. 677

Partlow, J.

In the county court of Winnebago county, plaintiff in error, Albert Provenzano was found guilty by the court, a jury having been waived, upon three counts of an information charging violations of the Prohibition Act, and a writ of error has been prosecuted from this court to review the judgment.

On July 11, 1925, officers with a search warrant dated July 1, 1925, went to the home of the plaintiff in error and searched the premises. In the basement of the house they found a fifty gallon still in operation with liquor flowing from it; eighteen barrels of mash; a two gallon jug; a five gallon jug; a ten gallon keg, the jugs and keg being full of intoxicating liquor; also a barrel partly filled with wine, and 1000 pounds of corn sugar.

The material parts of the affidavit upon which the search warrant was based are that affiant had just and reasonable grounds to believe that intoxicating liquor was unlawfully possessed, kept for sale, and sold, and that certain mash, a still, and other property designated for the illegal manufacture of liquor, were possessed in a certain dwelling house, basement, outbuildings, and entire premises located at and commonly known as Number 1316, South Church street, in the city of Rockford, Winnebago county, Illinois; "and that the following are the reasons for his belief, to-wit; that this said affiant, on the 21st day of June, 1925, personally in and upon said above described premises purchased intoxicating liquor from the said Albert Provinzano."

It is insisted that this affidavit was defective because Section 29 of the Prohibition Act, and Section 16 of the Search and Seizure Act, provide that no warrant shall be issued to search a private dwelling house occupied as such, unless such residence is a place

October Term, 1925.

The People of the State of Illinois,

Defendant in error,

vs.

Error to the County Court

of Winnebago County.

Albert Jovanenno,

Plaintiff in error.

239 I.A. 677

In the county court of Winnebago county, plaintiff in error, Albert Jovanenno was found guilty by the court, a jury having been waived, upon three counts of an information charging violations of the Prohibition Act, and a writ of error has been prosecuted from this court to review the judgment.

On July 12, 1925, officers [illegible] [illegible], went to the home of the plaintiff in error and searched the premises. In the basement of the house they found a fifty gallon still in operation with liquor flowing from it; eighteen barrels of mash; a two gallon jug; a five gallon jug; a ten gallon keg, the same one being full of intoxicating liquor; also a barrel partly filled with wine, and 1000 pounds of corn sugar.

The material parts of the affidavit upon which the search warrant was based are that affiant had just and reasonable grounds to believe that intoxicating liquor was unlawfully possessed, kept for sale, and sold, and that certain mash, a still, and other property designated for the illegal manufacture of liquor, were possessed in a certain dwelling house, basement, outbuildings, and entire premises located at and commonly known as Number 1816, South Church Street, in the city of Rockford, Winnebago county, Illinois; "and that the following are the reasons for his belief, to-wit: that this affiant, on the 21st day of June, 1925, personally in and upon

of public resort, or intoxicating liquor is sold or kept for sale, or possessed therein, in violation of law; that if the affidavit had alleged that affiant saw a still and intoxicating liquor in some outbuilding, or in some other part of the premises apart from the dwelling, it would not be a sufficient allegation upon which to base a search warrant for the dwelling house; that there is no allegation that the sale was in the dwelling house.

The affidavit describes the premises as a certain dwelling house, basement, outbuildings, and the entire premises, at a certain street and number. A description by street and number is sufficient. Frost vs. People, 193 Ill. 635. There can be no uncertainty as to the description of the premises sought to be searched. It would be difficult to describe them much more specifically. The entire premises are included in the complaint and search warrant. In People vs. Shields, 309 Ill. 142, the affidavit was against a dwelling house known as Number 511 South Wright street, Bloomington, Illinois, and the reason for the complaint was that affiant had purchased intoxicating liquor there by the drink and by the bottle. It was insisted that the affidavit was not sufficient, but the court held that this contention was not sound and that the affidavit was sufficient basis for the search warrant. Under this authority the affidavit was sufficient both as to the description of the premises and the reason for the belief of affiant that liquor was unlawfully kept thereon.

Plaintiff in error insists that even though the affidavit was sufficient that under its allegations the liquor sold to affiant may have been sold to him in the yard, in some outbuilding, or tent, not connected with the dwelling house, and that he did not purchase it in the dwelling house or basement, and for that reason the affidavit was not sufficient to justify a search of the dwelling house as provided in the statute. The officers testified that they found the still and liquor in the basement of the dwelling house. There is no evidence as to the kind or character of the remainder of the premises, or that there were any outbuildings on the premises. In fact there is no evidence that there was even a yard surrounding

the dwelling house. The only evidence is with reference to the dwelling house and basement. In this condition of the record we are asked to assume that there might have been some outbuilding, tent, or yard in which affiant might have purchased the liquor instead of having purchased it in the dwelling house. If there was no tent, outbuilding, or yard in which the liquor might have been purchased, and the premises consisted entirely of the dwelling house and basement, it certainly could not be successfully contended that the allegations of the affidavit were not sufficient to charge a sale in the dwelling house. In other words, even if there was merit in the contention of the plaintiff in error that under the allegations the liquor might have been purchased on some part of the premises other than in the dwelling house, in order for plaintiff in error to avail himself of this contention, it was necessary for the evidence to show that there were outbuildings, a tent, or a yard in which the purchase might have been made. In the absence of such evidence we cannot assume that there were any such places on the premises, and therefore, the contention of plaintiff in error is not sustained.

In People vs. Shields, supra, one of the objections to the affidavit for the search warrant was that it contained no statement as to the date of the unlawful possession, or as to when, or from whom, the purchase was made, and it was insisted that for this reason the affidavit was not sufficient and that the search warrant was improperly issued. The court, however, overruled this objection and held that the affidavit was sufficient. Under this authority it was not necessary to state the date of the unlawful possession, or as to when, or from whom the purchase was made. This case disposes of the contention that the lapse of about three weeks between the sale of the liquor and the service of the search warrant was sufficient to defeat the cause of action.

The first count was for the unlawful possession of intoxicating liquor, the second was for the unlawful manufacture of intoxicating

liquor, and the third was for the unlawful possession of a still. The first count charged that plaintiff in error, in the county and state aforesaid, on July 11, 1925, intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit for use for beverage purposes, did then and there unlawfully, and except as authorized in and by the Illinois Prohibition Act, have and possess, with the intent to sell the same without having then and there a permit from the Attorney General so to do. Plaintiff in error insists that the language, "and except as authorized in and by the Illinois Prohibition Act", which is in each count, rendered each count meaningless, therefore the information was insufficient and should have been quashed. In People vs. Tate, 316 Ill. 52, the first count of the indictment alleged that the defendant unlawfully and wilfully possessed for the purpose of sale, certain intoxicating liquor without having a permit from the Attorney General. The second count was the same as the first except that it charged a sale. Both of these counts were held to be sufficient. Each of the counts in the case at bar contains all of the allegations contained in the indictment in the Tate case. They also are in the substantial language of the statute creating the offenses. They were sufficient, and the clause complained of did not render the counts meaningless so as to require the quashing of the information.

Complaint is made that there was no proof to sustain the allegations of the various counts that the accused did not have a permit from the Attorney General. This was a matter of defense which plaintiff in error could have proven if he had such a permit. People vs. Williams, 121 Ill. 84.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6th day of Jan. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

239 I.A. 678

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On DEC 2 - 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,
Defendant in error,
vs.
Leonard Ditto,
Plaintiff in error.

Error to County Court of Henderson County.

239 I.A. 678

Jones, P. J.

This was a prosecution in the county court of Henderson County against the plaintiff in error upon an amended information containing four counts. Defendant in error elected to go to trial on the first count, which charged the unlawful sale of intoxicating liquor. A trial before a jury resulted in a verdict of guilty. Plaintiff in error was sentenced to the Illinois State Farm for a period of six months and to pay the costs of prosecution.

The cause was argued orally in this court, and plaintiff in error urged the verdict was against the manifest weight of the evidence. There is no motion for a new trial contained in the bill of exceptions. In order to present to a court of review the question whether a verdict is against the evidence it is necessary for the party against whom the verdict passes to make a motion for a new trial, and upon the motion being overruled, to except to such ruling and to preserve that exception by a bill of exceptions. Yarber v. C. & A. Ry. Co., 235 Ill. 589 (597); People v. Moritz, 238 Ill. 494 (496); People v. Faulkner, 248 Ill. 158 (161). Where the bill of exceptions fails to show that any motion was made for a new trial, or that an exception was taken to the action of the court in overruling such a motion, if made, no reversal of the judgment can be had. It is not sufficient that the transcript of the record, as made up by the clerk, shows that such motion was made and overruled, and that an exception was taken. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61 (75), and cases there cited. People v. Arnett, 317 Ill. 425.

Plaintiff in error further contends that the trial court erred

The People of the State of Illinois,

Defendant in error,

vs.

Leonora Ditto,

Plaintiff in error.

Error to County Court of Henderson County.

2391 I.A. 678

Opinion, J. C.

This was a prosecution in the county court of Henderson county against the plaintiff in error, Leonora Ditto, for a violation of the Illinois Pure Food law. Plaintiff in error was convicted before a jury and fined $100, which charged the unlawful sale of intoxicating liquor. A trial before a jury resulted in a verdict of guilty. Plaintiff in error was sentenced to the Illinois State Farm for a period of six months and to pay the costs of prosecution.

The cause was argued orally in this court, and plaintiff in error urged the verdict was against the manifest weight of the evidence. There is no public Pure Food law [illegible] in this case. [illegible] the evidence [illegible] upon the motion being overruled, to except to such ruling and to preserve that exception by a bill of exceptions. Yerker v. [illegible] Co., 236 Ill. 589 (597); People v. Moritz, 238 Ill. 494 (499); People v. Faulkner, 248 Ill. 138 (161). Where the bill of exceptions [illegible] by that an exception was taken to the action of the court in overruling [illegible] motion, [illegible] of the [illegible] and. It is not sufficient that the transcript, as made up by the clerk, shows that such motion was made, but that an exception was taken. Grand Pacific Hotel Co. v. Kinker, 217 Ill. 61 (76), and cases there cited. People v. Ahnett, [illegible] Ill. 432.

Plaintiff in error further contends that the trial court [illegible]

in refusing his application for a change of venue. Neither the motion for a change of venue nor the ruling of the court upon it is to be found in the original bill of exceptions. The record shows that on November 15th, 1924, being one of the regular days of the November term of the court, it was ordered by the court that plaintiff in error have sixty days from that date in which to file a bill of exceptions. The court adjourned to court in course on November 24th. The bill of exceptions was signed on January 9th, 1925. On January 13th, 1925, the trial judge by an order entered in vacation after the November term, gave plaintiff in error leave to amend and refile the bill of exceptions or to file an additional bill of exceptions on or before January 24th, 1925, and such purported amendment to and additional bill of exceptions was signed on January 20th, 1925. Defendant in error in apt time filed a motion in this court to strike the same from the bill of exceptions. If a party desires the amendment or correction of a record after the term at which the cause was tried, he should, on proper notice, apply in open court, so that the amendment, if allowed, will appear from an order of court entered in term time. A bill of exceptions in a proceeding at law, when properly filed, becomes a part of the record in that cause; and an amendment of the bill already signed or a supplemental bill of exceptions, is such an alteration of the record as can be made only upon the order of the court. Wallahan v. People, 40 Ill. 102. An order extending the time for signing a bill of exceptions is a judicial act which can only be performed in term time and by the judge while presiding in the court and exercising the judicial functions of the court. U.S. Life Insurance Co. v. Shattuck, 159 Ill. 610 (615), and cases cited. Hake v. Strubel, 121 Ill. 321 (325).

The purported amendment to and additional bill of exceptions has therefore not been made a part of the record and the motion to strike the same is allowed, and it is stricken from the files.

With the record in this condition, there remains nothing further for this court to review.

The judgment of the county court will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 6th day of Jan. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

Gen. No. 7708 April Term, 1934 Agenda No. 50

The People of the State of Illinois, Defendant in Error, vs. Louis De Pappe, Plaintiff in Error,	Error to County Court of Christian County.

239 I.A. 678

Crow, J.

The grand jury returned against defendant a true bill of indictment charging him in ten counts with the unlawful sale of intoxicating liquor. The language of each is the same and charges that on the day specified defendant "in the County of Christian and State of Illinois did unlawfully sell intoxicating liquor contrary to the form of the statute" etc. The indictment was certified to the County Court for process and trial. In the County Court defendant filed a motion to quash the indictment which was overruled. Other motions were made but it is not necessary to notice them.

The case has been before this Court on two previous occasions. on the first, the certificate of the County Court authenticating the record was overlooked and the writ of error dismissed under the belief the record was not authenticated as required by law and the rules of this Court. On petition for rehearing, this was found to be erroneous. On allowing a rehearing the judgment of the County Court was affirmed. After the decision of the Supreme Court in People v. Barnes 314 Ill.140, People v. Martin, id.110, and People v. Tate 313 Ill. 3, held that an indictment couched in the language of the indictment in this case is fatally defective and cannot be made the basis of a judgment of conviction. A rehearing was again allowed and the cause taken at the April Term of this Court on the original record, abstract, and briefs.

The Court having overruled defendant's motion to quash the indictment and in arrest of judgment, he assigns as error the Court erred in denying the motion to quash the indictment and motion in arrest of judgment, for the reason that the indictment is not sufficient in law to warrant a conviction. Under the decisions above referred to and for the reasons given for the conclusions there reached, the judgment of the County Court of Christian County is reversed.

Reversed.

General No.7842 April Term,A.D.1925 Agenda 17

Compro Grain Company
vs.
H.A.Parkes,R.E.Parkes
Appellants,
and
Harry Baker, Appellee.

Appeal from the Circuit Court of Sangamon County.

239 I.A. 678

Crow,J.

Compro Grain Company purchased a quantity of wheat from appellants of the value $393.59. The wheat was produced on a leasehold for a term of years owned by Harry Baker, appellee. The Grain Company, after suit was brought against it by appellants for the value of the wheat, and having been notified by appellee that he claimed the wheat, filed a bill of interpleader in the Circuit Court of Sangamon County, deposited the fund, was allowed its costs and attorneys' fees, and the title to the money was heard on the respective contentions of appellants and appellee. The cause was referred to the Master in Chancery to take and report the evidence with his conclusions. He took the evidence, found the issues in favor of appellee and that he was entitled to the fund. On exceptions to the report it was approved by the Chancellor and a decree entered in conformity to the findings and recommendation. This appeal followed.

On October 27,1921,Baker sowed seventy acres of wheat on land which he held under a lease from Benjamin Knudson, and which would expire March 1,1925. October 26, 1921,Baker on his petition was adjudged a bankrupt. The crop of wheat having been sown after the adjudication,was not included in his schedule of assets. A trustee was elected at the first meeting of creditors of the bankrupt. On January 12,1922, the trustee filed a petition with the referee in bankruptcy asking leave to sell at private sale the unexpired term of the lease and the crop of wheat. The petition did not disclose that the wehat was not

included in Baker's schedule nor that it was sown after the adjudication. Upon certain representations in the petition as to the terms of the lease, it was represented that it would be difficult if not impossible to sell the leasehold at public sale and that it could not be disposed of separately from the wheat crop then growing on it and that it would be most beneficial for all parties that it be sold with the growing crops. It was furhter represented that H.A.Parkes and R.E.Parkes had offered the sum of $175 for the unexpired term and the growing crop, and asked that he be permitted to sell it to them free from liens or claims of creditors and that whatever claims creditors had might attach to the funds derived from the sale. The order was made and the property sold to them for $175.

June 13,1922, before the crop had matured, Baker filed a petition before the same referee, stating the fact that the wheat crop had been sown after the adjudication in bankruptcy, and, being after acquired property, the court had no jurisdiction over it as an asset of the bankrupt, and that the order for the sale was without jurisdiction. A hearing was had on the petition at which the Parkes were present and one of them, H.A.Parkes, testified, and an order was entered on June 27,19[illegible] "that said order of sale and the order approving said sale, be and the same are hereby set aside and declared null and void for want of jurisdiction of this court to make said order, and for want of authority in law of said trustee to make said sale. This order was duly presented for review to Hon. Louis Fitzhenry, District Judge for the Southern District of Illinois and it was affirmed, March 19,1923.

The Parkes, anticipating the decision of the District Court on the order of the referee under review, on January 27,1923, filed with the referee their petition asking that they be reimbursed their expenses incurred in harvesting, threshing and marketing the wheat crop, which

expenses they averred amounted to the sum of $263.20. On objection of the trustee and of Baker, the referee dismissed the petition. On review by the District Court this order was affirmed. The trustee in February, 1924, refunded to H.A. Parkes and E.E. Parkes the sum of $175, the purchase price of the wheat, according to the finding of the referee and the affirmance of the District Court. The wheat was harvested, threshed and sold before the order of the referee setting aside the sale was affirmed.

The above statement is taken from the stipulated facts in the record. Evidence was taken on matters we deem immaterial and unnecessary to set out. It is enough to say that if the facts in evidence and the finding of the Master depends on them, they are not open to review. The abstract in this court is the pleading of the appellants. In that respect, as in all pleadings, everything must be shown that will enable the reviewing court to say whether the errors assigned are well assigned; that is, whether the record supports the assignment.

The abstract shows the Master reported the evidence, his conclusions thereon, together with objections to his report and conclusions, and that it was stipulated the objections should stand as exceptions to the report. It discloses also, the Master found the equities with the defendant, appellee, and that he is the owner and entitled to receive the money paid into court pursuant to the interlocutory decree and that defendants to the bill of interpleader, appellants, are not entitled to recover from Harry Baker any sum on account of labor or money expended in harvesting the crop of wheat. The best that can be said of the abstract so far as it relates to objections to the Master's report is, it is a mere index, showing the pages of the record where it may be found. We will not avail ourselves of the information. People v. Raboin, 316 Ill. 75

On reference to a Master to take and report evidence, findings and conclusions, the established procedure is:(1) The taking of the evidence; (2) a finding or findings of fact with conclusions from the evidence;(3) submission to the parties by the Master of a tentative report of findings and statement of his conclusions; (4) objections by any party not satisfied with the findings or conclusions specifically pointing out the findings complained of;(5) argument of the objections before the Master, if desired; (6) supplemental report of the Master showing specifically his rulings on and disposition of the objections, and overruling or sustaining them or modifying the findings or conclusion;(7) filing the report with the Court with the evidence taken attached;(8) filing exceptions to the report with the clerk or by stipulation allowing objections to stand as exceptions;(9) disposition of exceptions by the Chancellor. Unless this order is substantially observed there is n thing for the Chancellor to determine and nothing, therefore, for review, except questions of law arising on the entire record. No controverted question of fact is, therefore, now open to review.

As matter of law there is nothing now before us for determination that had not been determined by a competent tribunal before the appellants involved appellee in this controversy. The United States District Court had decided that the wheat belonged to Baker. It had also decided th t the referee was without jurisdiction to order a sale of the wheat crop sown after the adjudication in bankruptcy for the obvious reason it was acquired after adjudication. It also decided appellants here were entitled to to recover nothing for harvesting the wheat. The unexpired term of the lease was sold at private sale for $175, together with the growing crop, on the representation it was worthless unless so sold. But the Court having no jurisdiction to order the sale, no title passed by the

trustee's sale and the trustee refunded the purchase money. It was a mere trespass committed by appellants to cut, thresh and market the grain. They were chargeable with knowledge that the law under the circumstances was that the property in the crop was that of the bankrupt. The evidence shows Baker was prepared to harvest the wheat and to thresh it, but they, having no better right than intruders, prevented his doing so. The controversy is one between appellants without title to the crop and appellee who had good title. Appellants knew it had been decided by the referee that appellee owned the wheat, and that an appeal by them from that decision was pending in the District Court. Appellants have preserved no exceptions to the findings of the Master on the question of fact involved and those questions are not open to review.

We find no valid reason for disturbing the finding and decree of the Circuit Court and that decree is accordingly affirmed.

Affirmed.

General No. 7848 APRIL TERM, A.D. 1925 Agenda 23

Lewis N. Willson,
Appellant

vs

A.D. Arnold,
Appellee

Appeal from the Circuit Court
of Morgan County.

239 I.A. 678

Crow, J.

Willson brought suit against Arnold to recover for injury to his automobile, occasioned, as he claims, by Arnold's horses being negligently let into a public highway by servants of Arnold and running against the automobile. Substantially, the declaration charges that while plaintiff was driving his automobile on the highway, a servant of defendant, without notice or warning to plaintiff and while exercising no control over them, released twenty six horses from a corn stalk field where they were being pastured, turning them into the highway while plaintiff was passing said field on the said highway in the exercise of due care for the safety of his automobile; and that in consequence and as a result of their being so released, they ran against the automobile of plaintiff and greatly injured it to the damage of plaintiff of $750. Issue being joined, the cause was tried by a jury which found for the defendant. Motion for new trial having been denied, judgment nil capiat was entered and this appeal followed.

It is insisted, as ground for reversal of the judgment, that the verdict was manifestly against the weight of the evidence; that the Court erred in sustaining objections to evidence offered by plaintiff; and in refusing instructions asked by plaintiff; and in giving instructions asked by defendant.

Briefly, the evidence shows that defendant owns a large farm divided by a hard road running east and west.

On the north side is a cornfield from which the corn had been removed and defendant's horses were turned into the field for pasture. South of the road was a blue-grass pasture into which, in the evening, the horses, were taken from the stalk field across the road, and watered. There was a wire fence on each side of the road with a gate on the south of the road and a temporary wire contrivance closing the entrance to the field on the north. On the evening of December 20, 1922, the servant of defendant as usual, let the horses out of the stalk field that they might pass across the road and through the gate into the blue-grass field. While they were so passing across the road four of them came in contact with plaintiff's automobile just opposite the opening in the stalk field, two of them dying as a result. The automobile was badly injured, the radiator being crushed on the right side, all the damage in fact being done to the right side of the car. It was moving west at the time. The damaged side was, therefore, on the north side, being the side toward the stalk field.

The controversy was whether plaintiff struck the horses and thereby injured his car as claimed by defendant; or whether, as claimed by plaintiff, they were let into the road from the gap at the stalk field, and the car injured by their running against it. It was contended by plaintiff at the trial that the right side of the car being crushed, the radiator being pushed over to the left, the right fenders being crushed and the front of the car being uninjured, the circumstances corroborated his claim that his car was struck by the horses and not that the horses were struck by his car. No useful purpose would be subserved, in our view as to the disposition of the case, by a marshalling of the evidence to show its probative value in support of one theory or the other. We are not

required to determine the contested fact. But the state of the evidence was such that accuracy in rulings on evidence at the trial and in instructions to the jury were required.

The giving of the eighth instruction at the request of defendant is challenged as error. This instruction undertakes to advise the jury as to the relative rights of the parties in the use of the highway. By it they were told "that highways are made and maintained among other things for the free passage of persons and of horses and cattle when properly controlled over, along and across the same and that a person driving horses or live stock over across and upon a public highway in this state, if they are properly controlled, has an equal right to the use of such highways with any other person riding or driving thereon in a motor vehicle or any other means of conveyance, and it is the duty of such persons to use ordinary care and caution for the safety and protection of such live stock or horses to prevent injury from being struck by a motor vehicle or any other conveyance; and it is also the duty of a person driving or propelling a motor vehicle on such public highway to use ordinary care and caution to prevent injury to the horses or live stock which are being driven along, over or across the same", etc., and if the jury find the facts according to those assumed, they should find the defendant not guilty.

The charge in the declaration was, substantially, that defendant possessed the drove of horses in charge of his servant and that he released and permitted them to escape into and upon the public highway through an opening in the fence along the north side of the road, without giving any notice of the fact they were turned into the highway or permitted to escape thereon. The instruction was not confined to a definition of the real issue made by the pleadings. The relative rights of the parties to the road in their respective situations was not involved.

It was not a matter of legal controversy as to which party had the superior right to the road. It could not be matter for controversy that plaintiff had the right to go upon the road, nor that defendant had the right to send or drive, or permit his horses to go across it. The only question was, conceding the right, as the declaration did, was it exercised with that degree of care and caution that should have been observed under the circumstances. The instruction embraces a false premise, that of the right to cross the road which was not denied, whereas the only question presented by the declaration was the care exercised in crossing it. A further clause in the instruction possesses the same vice. It instructs the jury as to the control over the horses that should be exercised by the defendant "at and next immediately prior to the time of the injury to the automobile". If they were negligently turned out of the field where they were safe and harmless, into and upon the road where they ran against plaintiff's automobile, the care of the defendant for their safety at the time they ran against it was not involved. The declaration presented the sole question of negligence in letting them out without exercising reasonable care to ascertain whether defendant's act in that respect would endanger plaintiff or others who had a right to use the road. This instruction is bad also for the reason that it assumes plaintiff was guilty of negligent conduct. After informing the jury as to the care of defendant for the horses and for those who might be on the road, it tells them if they so find," and that the automobile was injured by and as a result of the negligent conduct of the plaintiff", then in such case they should find the defendant not guilty. A plainer assumption of a fact cannot be conceived than that of negligent conduct by plaintiff contained in this instruction.

The fallacy underlying this instruction is manifest

from an examination of the authority cited in support of it, Christy v. Elliot, 216 Ill. 31. That case was decided on a state of facts radically different from this. There a team of mules drawing a wagon was being driven on a public highway. Defendant was driving an automobile toward the team of mules and meeting it. When the automobile met the mules they became unmanageable, upset the wagon, threw the occupants out and seriously injured the plaintiff. The driver of the automobile did not stop though he saw the mules were frightened. In 1903 (the injury occurred in 1904) the legislature passed an act limiting the speed of automobiles to fifteen miles per hour and requiring them to be brought to a full stop when meeting a horse ridden or driven by any person upon any street, road or highway and which was about to become frightened by the approach of such automobile, until such horse or horses had passed. Plaintiff having recovered damages for his injury, the case went directly to the Supreme Court, the constitutionality of the act being challenged. A statement of the case shows there is no analogy between it and this. In that case there was use and travel on the road by the parties having charge of the respective means of travel. The question of the relative rights of the parties was in the case because the action was brought upon a statute regulating those rights which it was claimed had been violated. Both were travelers on the highway. We think the Christy Case is not authority to the extent claimed for it on the points to which it is cited.

We are of the opinion the tenth and thirteenth instructions complained of are not subject to the criticism directed against them. The latter relates to contributory negligence. In the third instruction given for the plaintiff contributory negligence, while not defined, is described as applicable to plaintiff's right to recover. It is not likely the instruction given for defendant misled the

jury on that subject. If there was failure to define negligence as appellant complains, the fault rested as much with plaintiff as with defendant.

The fourteenth instruction for defendant is criticised and is said to be misleading. The alleged vicious feature of it is, it tells the jury plaintiff "must prove his case by a preponderance of the evidence". It is said it does not tell the jury what is necessary for plaintiff to prove in order" to prove his case"; that "it leaves the jury to think as they please on the question as to whether the defendant has proved his case". Let that be granted. Ordinarily it might be reversable error to grant the jury a "roving commission" by use of such an instruction to ascertain whether the"case" is proved. But it is well settled as law and good sense that one party will not be allowed to reap benefit from an error if he has committed like error. The identical statement of the duty of plaintiff is contained in the fifth, sixth and seventh instructions given at his request. If he did not see fit to enlighten the jury by more accurate instructions, he ought not to be permitted successfully to accuse the defendant of misleading it by the same form. We agree fully with counsel for appellant in all that is said about giving an instruction containing such expression. But he is in no position to invoke the principle.

The sixteenth of the series given for defendant is criticised as being specially directed against the credibility of plaintiff and the weight to be given to his testimony. It is the usual instruction often approved on the subject to which it relates. It is general in its expression of the tests of credibility, and if it be true, as counsel say, he is the only witness in the case whose statment had been contradicted we are aware of no principle that exempts him and his testimony from the test.

Instructions 21,22,23,24,25, and 26 were refused and

it is contended it was error to refuse them. The jury having found against plaintiff on the right of recovery and the twenty second relating to the element of damages, we need not dwell on its refusal. Suffice it to say it would not enlighten the jury on the measure and elements of damages and it was not error to refuse it. Those numbered 21,23,25 contain principles applicable to the case being tried as made by the evidence and ought to have been of more value in enlightening the jury than all others combined given for the plaintiff. They all relate in a concrete manner to the question being tried and should have been given. The twenty sixth refused was properly refused. It is an argument which the Court was requested to make in writing from the bench. He properly refused to make it. Counsel for appellee are in error in their assertion that those refused instructions which we hold to be good are embraced in others given.

Concluding this branch of the case, we are impressed with the conviction any errors in disposing of instructions by the learned judge in this warmly contested trial were caused largely or at least materially contributed. to by the large number, the repetition, and needless length of the instructions.

We think the Court erred in excluding the testimony of the witness Berger. The condition of the car was directly material to the extent of determining the reasonableness of the charges for repairing the injury. But indirectly, as a thing speaking testimonially, it was of great importance. If the front of the car was battered and broken a different inference might reasonably be drawn than would be drawn if it was undented and all the injury was on the right side of it. Direct evidence that the horses ran out of the field suddenly against the car as it passed the gap from the stalk field might be overcome by the fact that

the front of the radiator was crushed as by an impact with them; and conversely, if there was no such condition of the front, and the right side was crushed and the radiator pushed bodily to the left, or the engine was so pushed, the inference of a frontal impact in the minds of fair men would probably be overcome, The fact might not be controlling , but, along with all the other evidence it was eminently proper to be laid fully before the jury as a basis for an inference as to the manner of the occurance. Relevancy is a matter of logic and not of law, except in so far as matters logically relevant may have been declared by statute to be irrelevant, or e converso.

For the errors indicated the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and Remanded.

General No. 7824 April Term, 19[illegible]. Agenda [illegible]

Maria Glandt,	:	
Appellant,	:	Appeal from the Circuit Court of
vs.	:	
Charles Glandt,	:	Champaign County.
Appellee,	:	

239 I.A. 679

Crow, J.

By this appeal it is sought to reverse a decree dismissing appellant's bill for divorce for want of equity. The charge was extreme and repeated cruelty. When the cause came on for hearing and after the Court had heard the evidence, he took it under advisement. While under advisement, appellee employed other counsel and he asked to be permitted to introduce further evidence, which was done with the result indicated above.

This is one of those cases requiring more wisdom than man possesses. It is one dealing, not with dollars and cents, nor with possessory rights of property, It involves the stability, if not existence, of the family. Its effect is to disturb, if not destroy, the domestic relation, basic of the society in which we live. There are four children — two boys and two girls, aged 17, 15, 9 and 7 years. The oldest, a boy, is in the University of Illinois, and the second oldest, also a boy, is in the high school at Urbana. The husband is a hard working man, industrious, and frugal to the verge of parsimony. He seems never to have made large wages, but has been content to serve at humble labor. By his economy and industry he has acquired a nice modern home. He had charge accounts at the book stores where the children could get and did get, all the books they needed. He had an account with the grocer and the butcher and they lacked for nothing to eat and wear, though he complained of the quantity consumed.

The wife, mother of the children, has been a hard working woman. She did not permit their circumstances and

her husband's industry and thrift to be an excuse for idleness. She did washing and other like work and spent the money on the family and some on the property -- the title to the home being in their names as joint tenants. Like a good mother, she evidently loves her children. She kept them clean and their clothes in good condition.

The evidence shows, we think, that appellee was guilty of extreme and repeated cruelty toward his wife. The record presents a revolting lack of sense of humanity in his general attitude toward her. That of itself, if not accompanied by acts of physical violence, would not, under the decisions of the Supreme Court, be grounds for divorce. But the evidence shows that on several occasions he struck her, pinched her violently and accompanied the acts of physical violence with reproachful epithets of the most repulsive character. They are of such character we will not put them on the records of this Court. He frequently cursed her, "swore at her", and, with the acts of physical cruelty disclosed by the evidence, constitute a condition that can but render her life miserable.

There is evidence in the record of very abusive conduct toward the little children. This would not be ground for divorce, but it is proper to be considered with the other evidence as to his disposition toward the members of his family, including his wife. On one occasion he kicked the little girl, knocking her down the steps into the basement when she was carrying some potatoes down the stairs. On another occasion he knocked one of the little girls down. The vile epithets above referred to were uttered in the presence of the children. Another occasion of their trouble was on a Sunday morning about two years before the bill was filed. The two girls were going to Sunday school. It was the first Sunday in the month. On that day they were expected, at least it was the custom, to put a nickel in the contribution box instead of a penny as on other occasions. Being asked for the nickels, he became enraged and struck complainant in the mouth with his fist. She

reached for the telephone receiver to call some one and he pushed her down and injured her leg on a rocking chair. On this occasion the deputy sheriff was called who reprimanded him for his misconduct. She was crying and the children were clinging to her and he was cursing. The deputy sheriff called, or had some one call a woman probation officer. She came to the house and found the same condition.

The pinching referred to above was a repeated offense. It was claimed by complainant that the pinching produced a permanent injury which would not heal. A doctor testified it was a "lupus", a skin disease. But the evidence shows it occurred where he had pinched her and that its inception was on one of the occasions when he had pinched her. The doctor testified he cured it. But, whether it was produced by the pinching or not, the evidence convinces us he did cruelly pinch her on more than one occasion.

On account of the nature of this controversy we have read and considered the evidence with much care. We are not unmindful of the fact the chancellor saw the witnesses and had opportunities not possessed by us, for appraising the evidence. We find nothing in it that impeaches the evidence of the acts of cruelty. We do find in the record most unmistakable evidence of some of the witnesses being willing to paliate the defendant's conduct. The very fact lends strength and support to their evidence as to the offense itself.

The question of personal physical violence as an ingredient of cruelty in divorce cases is not a subject of discussion. Trenchard v. Trenchard, 345 Ill. 313; Maddox V. Maddox 189 Ill. 152. Neither is the element of repetition open to discussion. A single act of cruelty, however extreme, is not ground for divorce. Fisette v. Fisette, 146 Ill. 328 Hitchens v. Hitchens, 140 Ill. 336; Kline v. Kline, 104 App. 274; Werres v. Werres, 102 App. 360. The one question open to discussion is, whether, under all of the circumstances, two or more acts of physical violence, constitute extreme and repeated cruelty.

Lenning v. Lenning, 176 Ill. 180. In Farnham v. Farnham, 73 Ill. 497, one of the grounds for divorce charged in the bill was extreme and repeated cruelty. The cause was tried by a jury which found the defendant guilty. The evidence showed that on two occassions the defendant struck his wife in anger. The Court said this would constitute, under the statute, a technical cause for divorce. The Court say no great physical injury was inflicted upon appellee on either occasion. But they say further, the jury could very properly consider abusive language, shown to have been applied to her not only in their private room, but in the presence of strangers, as characterizing the acts of physical cruelty, and as giving them a poignancy they would not otherwise have. He addressed her in the coarsest terms. In this case the evidence is much stronger and more convincing as to the act of physical cruelty, aggravated by personal epithets directed against her, than in the Farnham case, a leading case on the subject of cruelty as ground for divorce.

We have not been impressed favorably with the argument of counsel for appellant in his appeal to the members of this Court as to what they would do if they had heard this evidence. That is not a pertinent question. Knowing the learned chancellor trying this case as we do, we have not lightly regarded the evidence upon which he declined to grant a decree for divorce. But we are bound to decide it upon the whole record as that record impresses us.

Many cases are cited and liberally quoted by counsel on both sides of this case. They are always relied on pro and con in cases of this sort. There is no diversity of decision among them. Each was decided upon the facts peculiar to it and out of those facts the law arose. Two cases are seldom identical. In the diversity of facts legal principles are extended by analogy to instant similar cases. The question presented is not one of law, but of fact, to which undisputed and well established principles of law must be applied.

The decree of the Circuit Court is reversed and cause remanded. Reversed and Remanded.

General No. 7860 April Term, 1925 Agenda 32.

Vina Bradford,
Appellee,
vs.
C. E. Carpe,
Appellant,

Appeal from Circuit Court of McLean. County.

239 IA. 679

Crow, J.

Appellee held a judgment note for $500 purporting to have been signed by C. F. Carpe, payable to the order of H.A.Arnold one year after date, March 1, 1923, and bearing seven per cent interest. March 12, 1924, she caused judgment by confession to be entered in the Circuit Court for $586.15. On motion of appellant, the Circuit Court entered an order opening up the judgment with leave to plead. At the April Term, 1924, the cause was tried by the Court, a jury being waived. The abstract filed here states: "Motion by defendant to open up judgment entered against him by confession on the grounds of forgery and for leave to plead". October 11, 1924, judgment was rendered for the plaintiff and an appeal to this Court allowed and afterwards perfected. To procure a reversal five errors are assigned: (1) Finding the issues and judgment for plaintiff,(2) not finding issues for defendant,(3) trial Court erred in its interpretation and application of the law, (4) the Court misconstrued and misapplied the established law of estoppel in pais in its decision of the case, (5) judgment is contrary to law and against the manifest weight of the evidence.

Appellee raises the question of the sufficiency of the abstract to present the errors relied on. The abstract sets out with reasonable fullness,it seems, the evidence in chief and in rebuttal for plaintiff and that of the defendant But seven witnesses were called by defendant as experts as to the genuineness of Carpe's signature to the note and that testimony is not abstracted. It is true, after naming the several witnesses and stating their business and banking experience, the abstract as to their testimony concludes:

After comparing the signature "C. F. Carpe" on plaintiff's exhibit "A" with different signatures ". C. F. Carpe" on the notes and checks of defendant's exhibit 2, testified that signature on exhibit "A" was not written by the same hand as those of exhibit 2, and that in their opinion the signature on exhibit "A" is a forgery.

The trial being before the Court without a jury, every presumption will be indulged in favor of his finding of fact, except where such presumption is weakened or overcome by the evidence in the abstract or by proper inferences to be drawn therefrom. He saw the witnesses, observed their manner of testifying, the apparent fairness and candor or lack thereof and therefore is in much better position to appraise the value of their testimony than a reviewing court. A court of review will not reverse on a question of fact unless it must say upon a full, fair and careful consideration of all the evidence adduced before the trial court, it has manifestly reached a wrong conclusion.

We cannot say the conclusion of the trial court on the facts was wrong. Considering the evidence that is sufficiently abstracted, the conclusion was right. The Court saw the bankers and other experts and considered their testimony, no boubt. But for some reason, he found for the plaintiff. Did the cross examination of those witnesses disclose that they did not speak with that assurance that ought to overcome the testimony of witnesses testifying directly to the fact of genuineness? They were no doubt cross examined or the abstract, if properly constructed would show they were not. If they were cross examined, we are entitled to indulge the presumption it weakened their testimony, or it would be abstracted. All intendments are indulged against the pleader.

All we have said is for the purpose of again emphasizing the principle of practice on appeal that everything necessary to present fully to the reviewing court

the record made at the trial must be disclosed by the abstract. The transcript of the record is filed to confer jurisdiction to review. But for the purpose of hearing, it must be abridged, abstracted, so as to show what the judgment was, and what was the evidence or pleadings upon which the judgment was rendered. Unless fully presented by abstracting the direct and cross examination the presumption of right judgment will prevail against the pleader, and the abstract is the appellant's pleading. People v. Paul, 169 App. 557 (559).

It need not be said among lawyers that if the facts of the evidence establishing them are not fully presented, alleged misapplication of the law to the facts cannot be determined, for it is only"out of the facts the law arises". The abstract filed is wholly inadequate to present the case as insisted on the facts, and the judgment of the Circuit Court is therefore affirmed.

Affirmed.

General No.7867 April Term,A.D.1925 Agenda 53

L.S.Lacy for use of J.W.Crunder Appellee,

vs.

Fidelity-Phoenix Fire Insurance Company of New York. Appellant,

Appeal from the Circuit Court of Pike County.

239 I.A. 679

Crow,J.

The legal question presented by this appeal arises out of the ruling of the Circuit Court on demurrers, Judgment for plaintiff having been rendered because defendant refused to plead further after demurrer to plaintiff's replication was overruled.

The action was assumpsit on an insurance policy in the sum of $800 on a barn, the policy being fully set out in the declaration. The premium on the insurance was $55, for which a promissory note was given payable Jan.1,1924. Among others, the policy contained the condition:"But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any promissory note or obligation or part thereof, given for the premium,remains past due and unpaid". A loss occurred within the terms of the policy and defendant having refused to pay it, the action was begun to recover for the loss. The declaration contained the usual averments in actions on insurance policies and among others, that on June 6,1924, the said barn was destroyed by fire; that assured gave notice and delivered proof of loss, and that although he kept and performed all things by him to be performed, the defendant has not paid to the plaintiff the amount of the loss.

To the declaration the general issue and two special pleas were filed. The first plea sets out the condition in the policy heretofore quoted, and avers that at the time of the said supposed fire and supposed loss and damage, said note remained due and unpaid, that is to say,

the said note was to wit: After June 1,1924 and at all times thereafter past due, and was past due and unpaid at the time of the said fire and the said loss and damage by the plaintiff complained of; and so the said defendant says the condition upon which the said policy was made has wholly failed.

The second special plea sets out in haec verba the promissory note of the insured with its conditions, averring the note was dated May 31,1923 for the insurance premium for the sum of $55 payable to the defendant on the first day of June,1924, with interest; that it contains the condition that in case of the non-payment of the note at maturity, the insurer shall not be liable for loss during such default and the policy for which the note was given shall lapse until payment is made to the company. The plea also contained the averment of the condition of the policy above set out, denied lisbility under the terms of the contract sued on for loss and damage which occurred after the note was due and payable, and that the consideration upon which the policy was made has wholly failed.

To these special pleas plaintiff filed a replication in substance; that it was the practice and custom of the defendant, after the issuance of the policy declared on and up to the maturity of the note to notify makers of such notes of the time of their maturity and that defendant, contrary to its custom and practice neglected and failed so to notify and advise plaintiff previous to the maturity of the note when it became due and payable and the place where it should be paid; that though he was ready, able, and willing to pay it, forgot the date of maturity and forgot and failed to pay it on or before maturity; "by reason of all the foregoing premises, the conditions and provisions of said policy pertaining to the payment of said note at the time said note became due and payable, were waived by said defendant company and became of no force and effect".

To this replication a demurrer, general and special was filed. We regard some of the assignments of the special demurrer as in fact matters proper for consideration under the general demurrer and other such assignments as immaterial. The demurrer to the replication having been overruled defendant withdrew the general issue and the Court called a jury to assess damages, which were assessed at $800 for which judgment was rendered and for costs. Some proceedings occurred at the assessment which we do not consider it necessary to notice further than to say we are of the opinion the proper practice after defendant abided its demurrer to the replication, there being no general issue, the Court should have rendered judgment nil dicit for the amount claimed. But the form and manner in which the result was reached is immaterial, if any recovery could be had.

The plaintiff in his declaration relied on a complete performance of all things in the policy of insurance by him required to be kept and performed. Defendant confronted him with the charge in two pleas that he had not so complied and that he had failed in a vital matter in this: He had not paid the premium note, the non-payment of which under the express terms of the policy and of the note prevents a recovery for any loss or damage. He then undertook to shift his ground of recovery by averring in a replication facts, which he claimed was a waiver of the legal right of defendant to specifically allege against him for his failure to so comply. We need not decide whether the facts averred in the replication are sufficient to constitute a waiver. It may be said, however, in passing that it has never before been heard as a valid excuse for non-payment of a note that the maker "forgot it". But we do hold that under the terms of the policy and the premium note, he cannot maintain his action. The decision of this Court in Carlock v. Phoenix Ins. Co. 38 App.283, amply

supports the pleas of defendant. That decision was affirmed by the Supreme Court in Carlock v. Phoenix Insurance Co. 136 Ill.210, in an incisive opinion by Mr.Justice Scholfield where the principles are stated with that clarity for which he is justly noted. Jones v. Aetna Ins. Co.226 App.161 also supports the rule completely.

Not only is the replication demurable as matter of substantive law, but it is fatally defective because in its averments it is at war with the averments in his declaration. In the declaration he asserted his right to recover because he had performed all things by the contract required of him to be performed. In his replication, while he does not expressly allege he had not in fact performed, he avers an excuse for non-performance of an essential part of his contract, payment of the insurance premium note. By necessary implication he admits non-performance. This shifting of ground is appropriately denominated in our system of pleading a <u>departure</u>. It is a vice in form, rendering the pleading obnoxious to special demurrer, which was interposed against it. The principle of pleading and of substantive law is tersely stated with abundant support of authorities in Hart v. Carsley Mfg. Co.221 Ill.444 (446). That case was not unlike this, a condition precedent being involved and necessary to be performed or a justification for non-performance shown. The Court say! "Though an excuse for not performing a condition is for some purposes equivalent to performance, yet it is not the same thing; and therefore in pleading, performance must never be averred by a party who relies upon an excuse for not performing, but he must state his excuse", citing many authorities. See also Hensel v. Capitol Live Stock Ins. Co.219 App.77(80) per Dibell,P.J. It is constant practice for the plaintiff in the declaration on insurance policies instead of averring performance to aver matters constituting a waiver of conditions precedent. When this course is pursued, the

plaintiff assumes the burden in the first instance of establishing the waiver if the facts constitute a waiver, instead of performance. The recent case of Feder v. Midland Casualty Co. 316 Ill.552,decides the very question now in controversy and against the judgment rendered by the Circuit Court.

The Court erred in overruling the demurrer to the replication and in rendering judgment against defendand with the pleas on file. The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and Remanded.

General No. 7869 APRIL TERM, 1935 Agenda No. 35

Marie Bamis,
Appellee,
vs.
George Milauckas,
Appellant,

Appeal from the Circuit Court
Of Sangamon County.

239 I.A. 679

Crow, J.

Appellee brought suit against appellant for damages caused, as she charged, by an assault and battery. Pleas of justification and the general issue were filed Defendant employed a firm of attorneys consisting of two members. Before the case came on for trial one of them died. The other, before the day the case was for trial, called the attorneys for plaintiff by telephone and informed them that he would on that day be engaged in the trial of cases in another county and could not try this case at Springfield, and asked that it be reset for another day. In his affidavit filed for the purpose of procuring a new trial he stated facts substantially as above and further stated that "with that understanding in his mind" he told defendant "it would not be necessary for him to attend the trial". Relying on that statement defendant did not attend the trial.

The case was tried by a jury on the day set for trial, neither defendant nor his counsel being present. A jury having been selected and sworn, heard the evidence, the argument of counsel, the instructions of the Court and returned a verdict finding defendant guilty and assessing plaintiff's damage at $3500, for which amount the Court rendered judgment.

After the verdict and judgment other counsel were employed. They filed a motion to set aside the verdict and judgment. The grounds for a new trial were: The failure to make defense was not on account of negligence on the part of defendant; the verdict was manifestly against the

weight of the evidence; verdict the result of passion and prejudice: defendant had no oppertunity to make defense without fault or negligence on his part; failure to defend was on account of understanding the attorney for defendant had with attorney for plaintiff that the case would not come on for trial on January 14; defendant has meritorious defense.

In addition to the affidavit of the attorney, the substance of which is set out heretofore, the defendant and others filed affidavits in support of the motion. To rebut these, affidavits were filed by both attorneys trying the case for plaintiff and by several other parties. The motion to vacate the judgment and for new trial was overruled and this appeal followed.

We have carefully considered the evidence produced at the trial, and the affidavits filed on the subject of diligence of counsel as well as on the merits. We find nothing in the affidavit of the attorney originally defending this suit, nor in that of defendant, that appeals in any way to the Court in favor of setting aside the judgment. If all he says is true, he had no right as a prudent man and lawyer to assume, as he says he did, that the case would not be tried on the day it was set. We think, on the other hand, all that was said to him by plaintiff's attorneys was a caveat, a notice to beware. The mere fact he was engaged in court in another county was not a valid excuse for not attending the trial in Sangamon County, or making sure the trial would be postponed. His affidavit in connection with those of the attorneys for plaintiff, shows instead of furnishing ground for belief, or even hope for postponement, as a prudent man, acting in the interest of his client after the telephone conversations with the attorneys for plaintiff he should have gone without delay, and face to face with both of them settled the question of postponement, or directed his client to employ other counsel.

The affidavits of the two attorneys for plaintiff show they were each, in the telephone conversations with him, shifting the responsibility to the other. There is nothing in the showing made by him that justified the Court in granting a new trial on the ground of his absence from the trial. His negligence must be imputed to his client.

With regard to the merits, which we must consider, we cannot say plaintiff was not assaulted. The testimony of some of the witnesses is to the effect the defendant, a strong man, hit her with "an ordinary pound and half or two pound hammer." She was struck on the head and knocked down. She was picked up and taken to a hospital. After being there only a short time, about two days, she insisted on going home, and was taken home. The surgeons say she had a scalp wound. The only inference as to the character of the hammer is, the witness must have been mistaken as to its character, or the nature of the assult or she would probably have been killed. Affidavits were filed by defendant in support of his motion for new trial to the effect that the plaintiff only a few days before the occurrence was embroiled in a fight in which she was beaten about the head and face, her eyes blackened and her head and face bruised. Some of those filing affidavits say defendant hit her with the handle of the hammer. From a careful consideration of the facts as disclosed we are impressed with the belief the encounter was one in which the plaintiff was not without fault, that the injuries of which she complains were not all the result of defendant's blows, and that they were not nearly so serious as she claims. At the trial damaging and incompetent evidence was given before the jury. Witnesses testified to her complaints and her statement as to "feeling dizzy". These subjective symptoms were incompetent and highly improper and very prejudicial. Neither was it proper to allow proof or to instruct the jury, as to loss of, or injury to the clothing of plaintiff, there being no claim in the declara-

tion for such special damages.

For the purpose of recovering exemplary damages the financial worth of defendant was put in evidence. On this subject affidavits were filed in support of the motion for new trial. The evidence for the plaintiff was that defendant owned the Wabash Hotel with twenty-five or thirty rooms and worth from twelve to fifteen thousand dollars. Another witness says he thinks defendant has a coal mine at Beardstown. "He was back in the old country and got the money and bought the mine". This evidence as to the coal mine was incompetent. As to the value of the hotel, it was brought for $30.000 and he is paying for it at the rate of $100 per month, $3000 having been paid. There is little evidence of wealth in such testimony to warrant exemplary damages, which is evidently the principal component of the jury's verdict.

The Court are of the opinion this judgment should be reversed and the cause remanded if the plaintiff shall not within ten days after filing this opinion, in writing file with the clerk of this court an entry of a remittitur of $2000. If such remittitur shall be so entered, the judgment for $1500 will be affirmed.

Affirmed Conditionally.

Rehearing denied Oct-13-1925

Gen.No.7824 April Term, A.D.1925 Agenda No.3

The Town of Newburg, Pike County, Illinois,

Appellee,

vs.

Alva R.Foreman and A.Claude Foreman,

Appellants.

239 I.A. 679

Appeal from

Pike County

Circuit Court.

Shurtleff, J.

This is a proceeding under section 133, chapter 121 (Smith-Hurd Rev. Stat.) brought by the Commissioner of Highways of the Town of Newburg, in Pike County, for the purpose of having damages assessed by reason of the digging of a channel for Bay Creek over and across the lands of appellants.

The Commissioner of Highways applied to a justice of the peace for a summons and certified that it was necessary to enter upon the lands of appellants for the purpose of cutting a ditch to straight Bay Creek and provide a more direct water course through a bridge known as Doss Bridge, across said creek, on the public highway running east and west on the south side of appellants' land, and that the commissioner had been unable to obtain the consent of appellants to the cutting of a ditch on said lands for the purposes for which the commissioner had determined the necessity and had been unable to agree with appellants as to the amount of the damages appellants would sustain by the acquiring of the right of way and the cutting and locating of the ditch thereon and the certificate fully described the lands.

There was a trial by jury in justice court, and a verdict and judgment for appellants, fixing the value of lands proposed to be

taken and the damages to lands not taken, from which judgment appellants prosecuted an appeal to the Circuit Court of Pike County for a trial de novo.

Upon a trial had by jury, de novo, in the Circuit Court, a verdict has been found and a judgment entered in appellants' favor, for the sum of five hundred dollars ($500), two hundred dollars for lands taken and three hundred dollars for damages to lands not taken. The cause was prosecuted in the name of the Town of Newburg, Pike County, and there was no judgment in appellants' favor for costs. The lands taken for right of way consist of 2 60/100 acres, more or less, of which 40/100 acres at the north end and 47/100 acres at the south end lie within the present banks of Bay Creek and 1.73 acres more or less, is new right of way necessary for the proposed cut off of Bay Creek. In addition to the lands taken for the new creek bed or proposed ditch, the proceeding seeks to condemn a strip of ground 136 feet long by 16½ feet wide for a passage way from the public highway near Doss Bridge, running north over appellants' land along the east side of the proposed ditch. Appellants own eighty acres of land in a body, of which the lands taken and the lands not taken, but claimed to be injured, consist of about sixteen acres in the southwest corner of the eighty acre tract, cut up by Bay Creek and according to the testimony used as pasture lands.

Appellants have brought the record to this court by appeal and make various assignments of error.

Appellants assign error on the ground that the justice of the peace and the Circuit Court, on appeal, had no jurisdiction to hear the cause, because appellee did not present to either court the affirmative proof showing, the determination of The Commissioner of Highways as a matter of record, and the public necessity for the improvement and a tender of compensation to appellants, in accord-

ance with the statute as construed in Chaplin v. Commissioners of Highways, 126 Ill.264; same case 129 Ill.651, and Dierks v. Com'rs. of Highways, 142 id.197. It is further contended that no such proof was submitted in the justice court and that court being without jurisdiction, it follows that the Circuit Court was, therefore, without jurisdiction and appellants moved the Circuit Court to dismiss the cause.

No question was raised as to jurisdiction by appellants in either court prior to the empaneling of a jury. The statute provides that:

"The highway commissioners of the towns and road districts are hereby authorized to enter upon any land adjacent to any highway in their respective towns or districts for the purpose of opening any ditch, whenever it shall be necessary to open a water course to or from the natural water course, and to dig, open and clean ditches, etc. *** Provided that, unless the owner of such lands or his agents shall first consent to the cutting of such ditches, the commissioner shall apply to any justice," etc. Acting under this statute, appellee, through its commissioner, took official action, which was made a matter of record, determining, "the public necessity for the ditch "and that he has been unable to agree "with them (appellants) as to the amount of damages they and their "lands will sustain," etc. It is urged that this is not a sufficient finding and determination and that the justice had no jurisdiction.

It was held in Chaplin v. Highway Com'rs., 129 Ill.655:

"In the present case, there was no evidence that the commissioners ever took any official action as to the necessity of the drain. An attempt was made upon the trial below to show by parol testimony, that the digging of the ditch was necessary in order to carry off the water from the highway. This was clearly improper, and the objection to it made by appellant should have been sustained. A record of the action of the board upon the subject should have been produced."

"The second fact necessary to be shown, in order to give the justice jurisdiction, is the refusal of the owner to give his consent to the cutting of the ditch. No owner can be compelled to permit a ditch to be cut across his land, unless an offer is made to compensate him therefor. When section 8 uses the language, 'that, unless the owner of such land, or his agent, shall first consent to the cutting of such ditches, the commissioners shall apply to any justice,' etc., the meaning is: 'unless the owner *** shall first consent,' etc., after the commissioners have offered him an amount deemed by them to be a just compensation for the damage to be sustained by him. This is apparent from section 15 of the act, where the following words are used: 'when damages have been agreed upon * * * for ditching to drain roads.' It certainly could never have been the intention of the law, that the commissioners should take steps to condemn land, unless the owner gave land enough for a ditch, and waived all damages without any compensation whatever."

"It is, therefore, the duty of the commissioners, when they ask for the consent of the owner to open a drain on his land, to accompany their request with an offer of 'just compensation.'"

From an examination of Chaplin v. Com'rs. of Highway, 126 Ill. 264, it appears that in the Chaplin case there was no pretence on the part of the commissioners to make any finding or determination whatever, and on the hearing an effort was made to prove a public necessity by parol testimony.

Chaplin v. Com'rs. of Highway, supra, has been referred to as dicta and passing upon questions that were not in the case. Chaplin v. Com'rs of Highway, supra, arose by bill in equity to enjoin the construction of the improvement. Dierks v. Com'rs. of Highway, supra, arose in a similar manner. In the Dierks case, supra. on page 210 the court held:

"When he is brought before the justice by a summons, he ought to be permitted to show, if such is the fact, that no necessity existed for the ditch; that there was no slough or pond of water in the highway to drain; that there was no outlet over the land; that the sole purpose of the ditch was, not to carry accumulated water from the highway, but for the purpose of carrying off sewage, or for some other purpose not contemplated by the statute; and if the justice should determine that there was a necessity when none existed after the damages had been assessed before a jury, on appeal, the same question might be renewed in the circuit court. As to the damages arising from the construction of the drain or ditch, whatever the amount might be for the land taken, the complainant would be entitled to recover that, and if her farm was damaged in any other respect, or its value impaired in any way in consequence of the construction of the drain or ditch, such damages she would also be entitled to recover before the jury called to assess damages. If we are correct in this, it would seem to follow that, in so far as the action of the commissioners in the proceeding before the justice was concerned, there was a remedy at law, and in that regard the bill could not be maintained."

From this case, it appears that the hearing on the question of public necessity is before the justice and not to be tried by a jury. The Dierks case further holds that the justice has jurisdiction to try the whole question of public necessity, and if that is so the Circuit Court of Pike County committed no error in refusing to hold that it, as well as the justice court, was without jurisdiction to hear the case. The record of the finding and determination of the Commissioner of Highways of the Town of Newburg was offered and admitted in evidence in the circuit court and was before the court. Just what testimony was submitted to the justice court, we are unable to say. It is not a court of record and we have no bill of exceptions before us. It is patent, of course, that no

official records were submitted other than the one introduced in the Circuit Court; and counsel urge very strongly, following the language in the Chaplin case, that a commentation, in some amount, should have been tendered to appellants. The question was not one of the issues in the Chaplin case; it is not specifically covered by the statute and it has always been a principle of law that it was not necessary to do a useless thing. The reasoning of the court in Indian Creek Dist. v. C.B. and Q.R.R., 295 Ill.346, citing Chaplin v. Highway Com'rs., supra, on a similar question, indicates that that court is not now following the rigorous rule originally laid down in the Chaplin case. We cannot agree with appellants on this assignment of error.

Appellants assign error because the cause is docketed in the name of the Town of Newburg and insist that it should have been brought in the name of the Commissioner of Highways. Section 178, under which this proceeding was commenced, does not specify in whose name it should be instituted. Section 87 of the same act, under which damages are assessed in laying out roads, provides that the cause may be instituted in the name of the town or road district. The Act, apparently, recognizes the town as a municipal corporation interested in roads and capable of bringing suits of this nature. It is true that under the former law regarding boards of commissioners, they were recognized as quasi corporations for the reason that such bodies usually acted by a majority (Commissioners, etc. v. Baumgarten, 41 Ill.258), but with the passing of the old system the reason for the rule has changed. The suit was properly brought in the name of the Town of Newburg.

Appellants complain at the court's refusal to give appellants' offered instructions as follows:

"The court instructs the jury that under the law the public is not required to fence the land proposed to be taken and it is proper for you to consider this fact in estimating defendants' damages."

The instruction was proper in form if there was testimony to support it. There was testimony that the sixteen acres were used for pasture lands. There is no testimony in the case, so far as we have been able to discover, however, pointing out the amount of fence required or the value and cost of the same. The briefs and argument point out the necessity of fencing the sixteen and one-half foot opening on the road and possibly the right of way one hundred thirty-six feet in length. Of this we are not certain. With no testimony in the record advising the jury as to the cost of fencing or the extent of its requirement, we would not feel warranted in reversing this judgment and sending the case back for another trial by jury.

It is objected that there was not a judgment in appellants' behalf for costs. In this we think there was error. It was held in Com'rs. of Highways v. Hohmeyer, 279 Ill. page 69:

"As a land owner must be paid his award over and above the costs of the proceeding to determine the amount of his compensation, it is clearly contrary to the constitution to adjudge against him the costs of the trial to assess damages."

Whether it should be denominated costs or the amount of appellants costs added to the amount of compensation and damages, to determine the proper amount of those items, makes little difference. In view of the decision in the Hohmeyer case, the judgment of the Circuit Court of Pike County will be reversed and the cause remanded to that court with directions to add to appellants' compensation for lands taken and damages to lands not taken the amount of appellants' costs in this proceeding, including the costs in this court, and enter a new judgment for the amount.

Reversed and Remanded with Directions.

Gen. No.7829 April Term,A.D.1925 Appeal No.6

Frances Kirkpatrick,
Appellant,
vs.
Quincy Herald Company,
Appellee,

239 I.A. 680

Appeal from the
Circuit Court of
Adams County.

Certiorari Denied

Shurtleff,J.

Appellant, on the 30th day of January,1922, filed her declaration and commenced her suit against appellee in the Adams County Circuit Court, in trespass, for slander and libel.

On the 16th day of January,1923, appellant filed an amended declaration. Appellant charges at great length in chronological order the events leading up to the publications complained of: that appellant had been seriously injured in the City of Quincy, on the 2d day of September,1919, and had brought a suit for the recovery of damages in the sum of five thousand dollars against the city. In her declaration against the City of Quincy she had described her injuries in the following manner:

"That she (the plaintiff) then and there suffered a severe sprain of the arch and ankle of her (the plaintiff) said right foot; that the tendons and ligaments of the entire right limb were also badly sprained and that said foot became terribly swollen and bruised," and appellant sets out an article published under date of July 16,1920, in appellee's paper, nearly a year after the injury, entitled: "Change of venue for Miss Kirkpatrick," in which, apparently, nothing can be gleaned except a bare account of a court proceeding not averred to be untrue, not libelous per se and there are no allegations or inducements charged that

with the publication tended to bring appellant into hatred, contempt or ridicule. The article does use the term "lee" in place of "limb" Another article is set out, published under date of October 17, 1920, entitled "Another Suit Threatened" in that the appellee was to be sued for ten thousand dollars for publishing about one of the attorneys in this case that: "He was sitting in court at the clerk's desk and was dangling his legs," and it appears there had been considerable publicity given in the Quincy papers by appellee and other newspapers as to the nature of appellant's injuries, using the term "leg" in place of "limb", all of which had been published after appellant commenced libel suits against various newspapers for using the term "leg" for "limb". There is another article in poetry published in October, 1920, of and concerning the Quincy Parade of the Shriners, in which one Lee Mays took part, of whom it was said:

"Lee Mays astride a donkey's back,
Cried out to all the jeering pack,
Shut up, you naughty low down fool,
My limbs, not legs, surround this mule."

The above is probably the nearest approach to ridicule, if it referred to appellant, as any statement set out in this lengthy document. There was another publication of a poem on December 5, 1921, entitled "Judge Not," signed "A Kiwanian," in which appeared the verse:

"I often hear the graceful shark,
Called many a low and hateful name,
He bites without a warning bark,
And has no honor and no shame.

"To all of this I might agree,
I'd never give him opportunity,
To pull my leg. Yet, why should he
Be pecked at by the whole community."

On January 6,1922, there appeared an article in appellee's paper which is charged to be the libel upon which this suit is based, it constituting, as averred in the declaration, a republication of all the matter that had gone before. The article followed the filing of two additional suits for libel by appellant, one against appellee, C.F.Eichenhauer and Lee Mays, and one suit against appellee and C.F.Eichenhauer, managing editor of the paper, at which time appellant had damage suits pending in the Adams County Circuit Court in which she was acting as her own attorney, to the amount of fifty-seven thousand dollars.

The article of January 6,1922, is a straightforward article, giving the history of each publication and demonstrating, so far as in its power lay, that none of the publications had appellant in mind or her troubles when the publications were made and the tone of the article was such as to lead any reasonable person to presume that there were occurrences among the Shriners, the Lee Mays and the Kiwanians that occasionally suggested humor and mirth and the inference was left that it was exaggerated ego for others of a different class and sex to assume that such publications had any reference to them.

There is nothing in the article of January 6,1922, libelous per se, or with the inducements and inuendoes averred, that in any manner tended to bring appellant into ridicule, contempt or shame, unless it may be said that her own assumption that appellant was referred to may have incited some ridicule toward her which appellant has encouraged by her own conduct. The whole list of articles, in their severest sense, constitute nothing but pleasantries and humor and no serious heed should have been given to them. Appellee had leave to plead and the time was extended and appellee failed to plead within the extended time. Appellant moved for a default and appellee filed a cross motion for leave

to file a demurrer, which was granted. This ruling is assigned as error. It was within the discretion of the court to grant appellee's cross motion and permit appellee to demur to the declaration. On a hearing, the court sustained appellee's demurrer and appellant, electing to stand by her declaration, the suit was dismissed and judgment entered against the appellant for costs and she has brought the record to this court for review.

We see no reason for disturbing the judgment of the Circuit Court of Adams County and the same is affirmed.

Affirmed.

2M 2-4-25

No. 4813a

Cons'd with 4813a

Frances Kirkpatrick, appellant, v. Quincy Herald Company,

llee. Gen. No. 7,830.

Motion

to dismiss

239 I.A. 680

rror to the Municipal Court of Chicago;
Superior Court of Cook county;
ppeal from the Circuit Court of county;
County Court of county;

e Hon. , Judge, presiding. Heard

the Branch Appellate Court

this court at the term,

ffirmed
eversed
eversed and remanded with directions.

pinon filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

RESIDING JUSTICE delivered the opinion of the court.

Judgment affirmed
Oct 13 - 1925

Gen. No.7830 APRIL TERM, 1925 Agenda No.7

Frances Kirkpatrick,
Appellant,
v.
Quincy Herald Company,
Appellee,

239 I.A. 680

Appeal from the
Circuit Court of
Adams County.

Shurtleff, P.J.

Appellant filed her declaration in the Adams County Circuit Court against appellee, charging libel on the 5th day of September, 1924. The declaration contains a great many of the articles and publications contained in the declaration between the same parties in Gen. No.7829, taken at this term of the court, for a knowledge of which reference is had to that case. The declaration contains sixteen pages single space typewritten matter, newspaper print and various pictures and scenes. There is one count in the declaration and if the matter was printed and written of and concerning appellant and was libelous, it would constitute libels of a different nature easily counted by the dozen. The declaration sets out fourteen different publications commencing on September 2,1919, and running to May 1,1924. The original abstract filed presents nothing of the declaration or pleadings. In an additional abstract filed appellant has presented the picture of a woman sitting on a table using the "World's Greatest Corn Remover,"-- a medicine evidently for the use of corns, labeled, "Gets It." This picture is said to be an advertising article issued by E.E.Lawrence & Co., Chicago, the heading of which is "Crippled by Corns. Use Gets-It. World's Greatest Corn Remover." The only reading matter contained in it concerns the removal of corns and callouses. The picture is that of a woman

sitting on a bench and apparently applying some of this wonderful concoction to her corns, an advertisement with which all readers of the daily papers and magazines are thoroughly familiar. The declaration concludes with some cartoons from the Chicago Daily Tribune of Monday, August 11,1924, portraying an embarrassing experience of Winnie Winkle, the Bread Winner, and the adventure of Harold Teen with the pup, which publications appellant avers the appellee caused to be generally understood were aimed at her and to ridicule her.

We attach the only reference in the abstract of appellant to the declaration as a part of this opinion with the allegations in the declaration in reference to the same.

Appellant avers that the appellee on to wit, May 1,1924, in the Quincy Daily Herald, maliciously made a certain publication therein, which, among other things, contained an indecent, false, scandalous and defamatory picture meant to represent plaintiff (appellant) and which did represent the plaintiff (appellant) to further maliciously ridicule, injure and defame the plaintiff and did thereby maliciously ridicule, injure and defame the plaintiff, and the said publication is libelous per se and is as follows, that is to say:

If a court is to hold matter of this nature libelous per se, and as tending to ridicule, injure and defame every person who may have a grievance against medical advertisements, surely the Lydia E.Pinkams, "Min" Gumps and Winnie Winkle and Harold Teens will have to go out of print. There is nothing in the declaration in this case, either by writing, printing, publishing, inuendo or averment, that tends to show that the matter was written,printed, published or pictured of and concerning appellant or that tended to ridicule, defame or scandalize her in any manner. The Circuit Court of Adams County sustained appellee's demurrer to the declaration, appellant stood by her declaration and judgment was entered for the appellee and against the appellant for costs, and we see no reason to interfere with the judgment.

Judgment Affirmed.

Rehearing denied
Oct 13 - 1925

Gen.No.7831 April Term,1925 Agent No.2

Frances Kirkpatrick,
Appellant,

vs.

Floyd W.Monroe,
Appellee,

Appeal from the
Circuit Court of
Adams County.

Certiorari denied

Shurtleff,J.

Appellant filed her declaration and commenced her suit in the Circuit Court of Adams County upon September 5,1924, against appellee, charging appellee with having made various slanderous statements and remarks of and concerning appellant on or about August 1,1921. Appellee demurred to the declaration generally and specially, raising the question of the Statute of Limitations. Thereafter, on the 25th day of October,1924, appellant filed an amended declaration making substantially the same charges as made on or about the 1st day of August, A.D.1921, and added to the charge the carelessness and negligence of appellee in reading a certain case in court, which appellant contended did not apply to the case under consideration and which defamed appellant. Appellee's demurrer was refiled and upon a hearing upon the declaration and demurrer the court sustained the demurrer and appellant electing to stand by her declaration, the cause was dismissed and judgment entered against appellant for costs. We have examined the declaration and demurrer and do not see how the court could have done otherwise than sustain the demurrer and dismiss the suit.

The judgment of the Circuit Court of Adams County is affirmed.

Affirmed.

General No.7833 April Term,19[illegible] Agenda No.9

In the Matter of the Conservatorship of William Elder Karr, Spendthrift, Etc.

William Elder Karr,
Plaintiff in Error,
vs.
Lee Rust, Conservator,
Defendant in Error,

239 I.A. 680

Error to McLean Circuit Court.

Shurtleff,J.

This cause was before this court at its April Term,A.D.1922, as Gen.No.7453, and to the opinion then filed reference is had for a full statement of the case. The cause had, theretofore been presented to the County Court of McLean County, upon objections made by the guardian ad litem of William Elder Karr to the final report of Lee Rust, conservator of the estate of William Elder Karr, a spendthrift, defendant in error in this cause, in which report the conservator had presented items for allowance as follows: Commission at five per cent on $5264.52, amounting to $263.23 as claimed in his report of November 20,1917. For services as rendered in the sale of the California land at three per cent of the sale price amounting to $1753.55,as claimed in his report of October,1918.

In his report of December 27,1918, defendant in error had presented a claim which was allowed, for acting as trustee for Karr prior to his appointment as conservator five hundred dollars and to compensation for services as conservator for defendant in error and trustee for Louise B.Karr from September 21,1911,to the date of the filing of his next report showing the closing up of the purchase of his ward's California land, forty-one hundred dollars.

And defendant in error in his report of November 20,1917, further reported that he had not paid himself the sum of forty-six hundred dollars previously allowed, but that he had used the same to apply on the payment of the California lands, being without other funds, and claimed interest on the allowance of forty-six hundred dollars to the amount of $887.04 There was an additional item for interest on attorney's fees of $132.89. Objections being heard in the County Court, an order was entered disallowing the interest items and allowing defendant in error three hundred dollars for his services as trustee prior to his appointment as conservator and setting aside the allowance of forty-one hundred dollars and allowing defendant in error five hundred dollars per annum for his services during seven years, making the total of the allowance thirty-eight hundred dollars for his services as conservator and trustee.

Defendant in error appealed and the cause was tried in the Circuit Court de novo and the judgment of the County Court was affirmed in that court, which defendant in error brought to this court for review. On the former hearing in this court as to the amount of the allowance to defendant in error for his services as trustee and conservator, it was held to be manifestly against the weight of the evidence and the judgment of the Circuit Court was reversed and the cause remanded, "as to the amount which should be allowed appellant for his services as trustee and conservator." The cause had been retried and the lower court allowed and entered a judgment for the entire amount of defendant in error's claim, including the interest charges of $887.04 and $132.89, and plaintiff in error has brought the record to this court for review. It is assigned as error that the Circuit Court, on remand, had no jurisdiction to consider or allow the items of interest amounting to $887.04 and $132.83. It is plain that the cause was remanded only upon the amount to be allowed to defendant in error for services.

A direction in an order of reversal that one part of a decree be modified, is, by necessary inference, an approval of that part omitted from the direction and is equivalent to an order of affirmance of the same. Man'f'g. Co. v. Wire Fence Co. 119 Ill.30. It is the duty of the trial court to modify decrees as directed by the opinion of the reviewing court and in no other manner. Pritchard et al v. Fruit et al. 214 Ill. App.340; Gridley et al v. Wood et al.220 Ill. App.46; It was error to include the items of interest in the judgment of the lower court.

Plaintiff in error contends that the proofs should have been confined to showing the usual, customary and reasonable charges for like services in Bloomington and McLean County, citing Gilbert v. Lloyd, 170 Ill. App.453, but the uncontradicted testimony showed that there was no usual or customary charge for the services that were rendered; that the services were unusual and the circumstances so peculiar that the rule contended for by plaintiff in error did not apply. In such case it is permissible to show the reasonable value of the services. L.N.A. & Co.Ry. Co. v. Wallace,136 Ill. 87; Maneaty et al v. Steele, 112 Ill. App.19. Plaintiff in error contends that in determining the amount to be allowed for services in this case, the amount paid out for attorneys employed by the conservator should be taken into consideration, citing Colton v. Coffey, 187 Ill. App.558. The rule laid down in Colton v. Coffey, supra,is confinedt to cases where counsel are employed to render the service that should be performed by the "administrator" or conservator himself and does not apply to this case. We have examined the record very carefully and while not free from error in rulings on evidence, there is no substantial proof shown or offered to be shown that attorneys were paid for services that defendant in error should have performed. It is contended by plaintiff in error that the amounts allowed for defendant in error's services are

grossly excessive, considering the time expended about the ward's business and the size of the estate. We have carefully reviewed the testimony and the entire record and while the amount of the allowance, $6616.37, seems large, we are not prepared to say it is against the manifest weight of the evidence. Defendant in error was in charge of this property for over seven years. The property itself, when taken over, was in a precarious condition owing to a floating indebtedness, the mortgage upon the McLean County lands and a considerable sum of money invested in an option in a large tract of land in California which would have been lost except for the most skillful attention. The estate was without funds and the position required a man of affairs who would give his time and attention to the trust and protect it with his individual credit and take with it the danger of loss and responsibility that goes with all such undertakings. From this it is not to be assumed that this court construes or sanctions the allowance, as based upon an extension of the conservator's credit, but rather as an evidentiary fact that the conservator did honestly and energetically devote his time to the duties of his office and preserved the estate. The testimony further shows that during much of the seven years legal proceedings were pending between plaintiff in error and his wife, and the defendant in error was of necessity trustee for both parties, and in some respects was called upon to look after the affairs of two households and provide for both. The court below saw and heard the witnesses and we are not in a position, from this record, to disturb the finding of the lower court as to the allowance made to defendant in error for his services as trustee and conservator.

There are two items of interest in the report, one for the sum of $887.04 and one for the sum of $132.89, covered by the original objections and finally passed upon in the former opinion of this court and disallowed and should be eliminated from the

judgment of the lower court. The judgment of the Circuit Court of McLean County will be reversed and the cause remanded with directions to sustain the objections to the two items of interest amounting to $887.04 and $132.89 and to overrule the objections and enter judgment upon the items for the amount of defendant in error's services as trustee and conservator and the items for commissions as indicated.

Reversed and Remanded with Directions.

Petition for ... denied Dec 16 - 1925

General No. 7821 April Term, A.D.1925 Agenda 1.

The People of the State of Illinois,

Defendant in Error,

vs.

Arthur Day and E.William Hight,

Plaintiffs in Error,

Error to Macon.

239 I.A. 680

Niehaus,PJ.

Plaintiffs in Error Arthur Day and E.William Hight were indicted in the circuit court of Macon county under Section 2 Chapter 38 of Cahill's Revised Statutes, for acts which, it is alleged, directly tended to render one Lois Harris, a female child under the age of 18 years, a delinquent child. A trial was had under the second and third counts of the indictment; the first count having been quashed.

The second count charges that "Arthur Day and E. William Hight, knowingly, wilfully and unlawfully did then and there encourage one Lois Harris then and there a female child and then and there under the age of eighteen years, towit: of the age then and there of 16 years to then and there become a delinquent child by then and there persuading her the said Lois Harris to then and there absent herself from her home then and there without just cause and without then and there having the consent of Oscar L. Harris and Marie Harris, the said Oscar L. Harris and Marie Harris being then and there the parents of the said Lois Harris."

The third count charges that "Arthur Day and E. William Hight knowingly, wilfully and unlawfully did then and there do certain acts which acts did then and there directly tend to render one Lois Harris, then and there a female child, and under the age then and there of eighteen years, to-wit: of the age then and there of sixteen years, a delinquent child, by then and there encouraging the said Lois Harris without just cause

then and there and without the consent then and there of Oscar L. Harris and Marie Harris, the parents then and there of her the said Lois Harris, to then and there absent herself from her home."

It is contended that the averments of the indictment were legally insufficient. The averments in the indictment charge the offense substantially in the language of the statute, and must therefore be held sufficient.

The trial of the case resulted in a verdict of guilty, and a judgment, sentencing the Plaintiffs in Error to imprisonment at the Illinois State Farm for a period of eight months, and to pay a fine of $200 and the costs; also, that they stand committed until the fine and costs be paid. A writ of error is prosecuted to reverse the judgment.

One of the assignments of error relates to the opening statement of the state's attorney. It is apparent that the state's attorney merely delineated in his opening statement, what he expected to prove on the trial, and in our opinion did not go beyond the limits which a full detailed statement of the case to be presented by the evidence required. McDonald v. People 126 Ill. 150.

The facts of the case as testified to by the prosecuting witness, Lois Harris, are substantially as follows: That she was sixteen years of age at the time the alleged offense was committed; and was living with her parents, and in the home, in the city of Decatur; that she met the Plaintiffs in Error on Saturday August 25, 1923, in front of the flower store situated across the street from the Baptist church in Decatur. Using her own language, she further stated:

"I met Mr. Hight in front of the Canton Tea Garden on North Water street, Eva Durbin, Margaret Harris, Buddy Shikowski and Gerald McCool, were with me when I met Arthur Day; Buddy Shikowski's name is Ernest; and I met them August 25, 1923, between 7*30 and 8 o'clock; he was driving in a Cadillac car and Ernest Shikowski and Gerald McCool were with him when I met him. they were sitting in the front seat; Mr. Day was driving and Ernest Shikowski was sitting next to him, and Gerald McCool was sitting on the outside; I saw them before the car stopped in

front of the flower store; we were coming down Water Street in front of the Bijou Theatre, and we girls happened to glance up and they were driving real slow. *** We were going north and they were going south in front of the Bijou Theatre, on North Water street. We walked on down to the corner going north across the street on North street, and the Baptist church, and then went across the street, and was going north again when Mr. Day and Ernest Shikowski and Gerald McCool came driving in the car and they stopped and motioned for us to come over and we went over to see what they had to say; they were going north on Water street and we were down there by the Baptist church on North Water street, on the corner; they were driving in front of the church and they didnt stop until they crossed North street in front of the flower store; when they stopped over there, we girls went to the car, and they asked us if we didnt want to get in and ride; Ernest Shikowski said that; and we girls hesitated, and we said we didnt want to go car riding and they said just for a few minutes. Ernest said they had a question they wanted to ask us girls, so we three girls got in. We three girls were in the back seat.

The boys all three of them were sitting in the front seat; after we got in the car they drove straight down Water street, and it was past Frank Rupert's store, and we turned round and came back; they turned round and come back on South Water street; after turning around, they stopped at Frank Rupert's store to let Ernest Shikowski and Gerald McCool out; there was something said by somebody about what they wanted with me before they turned around and came back and stopped at Frank Rupert's store; when we three girls got in the car, Ernest Shikowski introduced each of us to Arthur Day; then Ernest asked me if I would like to take a trip to Turkey Run, Indiana; he was driving - Day was driving the car - and I said no, I wouldnt go; then the girls said if I would go I would have an awful nice time, and Ernest Shikowski kept telling me I better go, that I would have a nice time, also did Gerald McCool; then Arthur Day said he would protect me, that he had a revolver with him at the time, and did not show it to us then. He said he would protect me; that he was a deputy sheriff at Assumption, that he was wealthy and had plenty of money and that he owned this Cadillac car himself, and that he had quite a lot of money; ammunition, shells and such things down at Frank Rupert's store, and if I went along nothing would happen to me.

During the time he was saying this Eva Durbin and my sister Margaret Harris, and Gerald McCool were all in the car and heard what was said; Arthur Day said they were going to make a trip to Turkey Run, Indiana; Arthur Day said that I, or that himself and his uncle, E. William Hight, and his lady friend and myself included, if I would go to Turkey Run, Indiana; he just said his uncle; he ssid he was a banker down at Assumption and that he, E.William Hight, and his lady friend, were going on the trip also; speaking of E. William Hight he simply said his uncle; he said his uncle and lady friend were going on a trip down to Turkey Run, Indiana; and that he Arthur Day, would like for me to go with him. The girls kept saying I had better go, I would have an awfully nice time, and also the boys did too, and we drove all this time, -We were driving - down south on Water street; we were headed north on Water street after we let the flower store; we went straight north, and we turned around on Grand Avenue, and drove slowly back south on North street and stopped at Frank Rupert's and Ernest and Gerald got out at Frank Rupert's. The conversation that I have just related took place while we were driving

north to Grand Avenue, and after we turned around and came back the boys got out; Ernest Shikowski and Gerald McCool got out, at Frank Rupert's store. Then we three girls were in the back seat and we drove back down Water street, going south until we came to Gushard's at the corner, and let Eva Durbin,-Arthur Day-let Eva Durbin and my sister, Margaret, out, and he said he wished they could go on the trip also, and perhaps he could take them some other time, and I wanted to get out and meet him later; I said that to him, and I asked him to let me out and I would meet him later; and he said, he would rather not, that he didnt have much time and he would rather I would go with him at the time because perhaps I wouldnt meet him later, and I got in the front seat. We drove around the block and came back down Water street, and drove real slow in front of the Canton Tea Garden to see if we could see his uncle and lady friend. We couldnt see anything of them, and drove around the block again, and he told me he had some sisters that werent at home, one was at Honolulu, and another was in another country. He also said if I didnt have a good time he would buy me the best silk dress in Decatur, and we came back down going north on Water street and stopped in front of the Canton Tea Garden, and his uncle and his lady friend got into the car and they introduced me; Hazel Oberlin said she was glad he got a lady friend to go with him. He introduced Hazel Oberlin by the name of Irene; I dont remember what the last name was, he just called her Irene, then he used Mr. Hight's own name; he called him Hight, and he used my own name, Miss Harris, and we drove down south to the Interurban station.

When the defendant Hight and this woman got into the car we were headed north, and we drove north down to Gushard's and then turned around; it was on down the next block we turned around and went up North Main Street, going south and we came back east, I dont know the name of the street, but we came back and stopped at the Interurban station on the east side; the man that came down from the Canton Tea Garden and was introduced to me as the uncle of the defendant, Arthur Day, was the defendant here; while we were driving down north on Water street with these boys, Gerald McCool and Ernest Shikowski, I said I wouldnt leave Decatur without the consent of my parents, and Mr. Day said, would it be all right to drive on down to the house, and I said, yes, we could do that, and Ernest Shikowski said something about seeing my father, that was closer, at the barber shop, and I said no, I didnt want to go down there and bother him at his work. Then the girl said instead of my going on home, Arthur Day said he had to meet his uncle and lady friend at the Canton Tea Garden about nine-eight o'clock, and that he didnt have much time, and the girls offered to tell my mother I had gone when they went home. I said I guessed that would be all right, but I would like to go home first. Then after we drove down, and got his uncle and lady friend at the Canton Tea Garden and drove up to the Interurban station, he said I could go in and telephone to my mother, and he gave me the money to go in; Arthur Day gave me the money to go into the Interurban station and phone my mother. I went in and called up Frank Hahn's next door to us; that is the neighbor next to where my mother lives, and I asked my mother if I could go to Turkey Run, to the Indiana State Park, and she said who with, and I said Arthur Day.

At this time the defendant Hight and his lady friend were sitting in the back seat of the Cadillac car, I left the car; they had been riding there in the car

from the time they got in, in front of the Canton Tea Garden, until we came up to the Interurban station. Day said while I was gone to phone my mother, he was going to get lunch; he didnt say where; he left just as I did. When I went to the telephone booth I telephoned; I was gone five or ten minutes; my parents did not have a telephone in their house at that time; when I came out of the telephone booth I came back tothe car and just Mr. Hight was in the car himself; his lady friend, Hazel Oberlin had left the car a few minutes. I got into the front seat of the car, and Mr. Hight asked me if I thought I would like to take this trip, and I said I didnt know yet, and he asked me if I was old enough to go on the trip, and I said I guessed I was. Mr. Day came back to the car and asked me what my mother said, and I told him my mother objected and said for me absolutely to come home, and he asked me if I went out if I would go out to the house now andask, that if we would all drive out and ask if I could go, if she would object and not let me go, and I said yes, I wouldnt get to go whatever, and he said being as we didnt have much time we would go then and drive on to Danville. Mr. Hight during that conversation was sitting in the back seat, and I dont think Irene Had come back yet - that was his companion. All the time, though Mr. Day was talking low enough so as Mr. Hight wouldnt hear; he asked me if I could go, and I said no; Mr. Day asked, if we were to drive out to my house. He also said for me to pretend we had known each other before, if anything came up, for me to say I had been acquainted with him for two or three years; Mr. Day said that. When I used the language that I told the jury of a moment ago, as to what my mother said, when I told Mr. Day, we didnt talk so that Mr. Hight could hear us; it was between ourselves, I and Mr. Day; after that Mr. Hight's companion came back to the car and we then left for Danville, going on the hard road to Monticello, out toward that way, and then drove through Monticello, stopped awhile, and then is when they heard a noise in the car, and Mr. Day said he thought it was the valve spring broke, and we drove on to and through Champaign and Urbana and we never stopped.

After I got into the car at the Interurban Station, when I say Day and Hight and his lady friend were in the car, we did nothing whatever only we started out for Danville, and went the hard road leading to Monticello; we went through Monticello, Champaign, Urbana and Danville, those were mostly the large cities. ***

We stopped at Monticello and got out of the car, We girls got out of the car to go to the hotel for a little while, and then we returned and got in the car and went on our journey. ***

In traveling Mr. Day was driving and I was sitting in the front seat beside him, and Mr. Hight and his lady friend were in the back seat.

Q. Do you know what time you arrived at Danville?
Twenty minutes after twelve by the clock. That is what I called Saturday night. ***

The conversation was over commonplace things. We were driving rather fast, and were driving I should think something right along 55 and 60 miles. ***

After we got into Danville, they wondered where they would go for the night; they didnt know which hotel to go to. Mr. Day asked Mr. Hight's lady companion if she knew of any hotel where we could go, as she had taught in Danville before and knew the city pretty well. She named over the Plaza, and they said that was a little too prominent for us to go to, and they would rather go to one that was smaller where

there wasnt so many people, and she then mentioned the Saratoga; she said that would be all right, so we drove our car down to a garage; it wasnt a Cadillac garage. It was only about a block from the Saratoga hotel and we walked over to the hotel; when I say we walked on down to the hotel I mean Mr. Day, myself. Mr.Hight and his lady companion, all four walked down from the garage where we left the car for the night, to the hotel. When we got down in front of the Saratoga hotel, we went in to the Saratoga hotel; It was exactly 30 minutes after twelve. Mr. Hight carried a small sort of traveling bag, and Mr. Day didnt have anything! but before we entered, we wondered what or how we would register. Mr. Day says to Mr. Hight "Well, how shall we register this," and Mr. Hight says, Well, for somebody to suggest something, and Mr. Day says why not register as man and wife under an assumed name. Mr. Hight said what would be the difference, why do we have to go under an assumed name; Mr. Day said perhaps someone down here would know us, and we wouldnt want them to find out, so Day went under the name - Mr. Day and myself went under the name of Parker; Day said he would, he wanted to get a name that would be easy to spell, and he said Mr. Parker would be all right, and Mr. Hight and his lady companion said they would go by the name of Mr. Williams. That is all they said, then we went to the Saratoga hotel. They then talked about where they would say they were from, and Mr. Day said why not put Chicago. Mr. Hight said that would be too far, why not put it, Springfield, so they said they would put Springfield as the place where all four of the party came from. These were all the conversations that took place. When these conversations took place we were driving down to the garage to leave the car. After we got to the Saratoga hotel, Mr. Hight registered first; I do not know what name he registered by only what he said he was going to register, when he registered I and Mr. Hight's lady companion were standing aside in the same room while Mr. Hight registered, and after he registered Mr. Day registered. I was present when Mr. Day signed the register. I did not see what name he signed to the register; I was not more than five feet away; or just a short distance; after they registered the clerk then called the porter who was sitting there right close to the elevator, to take us up to our rooms, and the porter took us, Mr. Hight and his lady friend, to their room first. That room was number 258; I am not quite sure of that; I was in room number 248 I believe. I went to a room there that night, Mr. Day went with me; that is the defendant here; I now recall the number of the room I occupied that night; the one that I and Mr. Day occupied; it was room 248. After Mr. Hight and Mr. Day registered, the porter took them up to their room, that is Mr. Hight and his lady friend, to number 258, and I and Mr. Day accompanied and went with them to their room, to the door of their room, and we said that we would stop when we got up in the morning, as we were going by, so they could be ready when we came back with the car, then the porter took I and Mr. Day to our room; it was quite a little distance from the room in which Hight and his lady companion were in to the room where Day and I occupied. It was on the same floor. *** We went to bed and had intercourse. *** He locked the door, then we got up about seven o'clock the next morning; after we entered the room that night, we undressed and went to bed, and had sexual intercourse; Day locked the door and took the key and kept it. I say we went to bed together; we undressed and went to bed. ***

We continued in that room during the remainder of the night; we stayed in that room until morning. After defendant Hight and his lady companion entered the room and the door was locked I did not see them any more that night; we got up about seven, and we, I mean Mr. Day and I got up about seven o'clock Sunday morning August 26th, and went to Mr. Hight and his companion's room, they were in bed yet, and Mr. Hight came to the door. Mr. Day told him we would go down to the garage to get the car, that we would be back in a few minutes, and for Mr. Hight and his lady companion to be ready.

Mr. Hight said he would be ready and for I and Mr. Day to go down and get the car and him and his lady companion would be out in front. The condition of the door as to being open or closed when Mr. Hight came to the door and talked to me and Mr. Day was the door was closed.

He opened the door, not very wide, because he didnt have his clothes on. Mr. Hight opened the door, that is the defendant here. After that Mr. Day and I left the hotel and went to the garage. We left the hotel the same way we went in the night before, that was through the first office."

Plaintiffs in Error objected on the trial, to the introduction of testimony in relation to what took place at the hotel in Danville; the registration of the parties at the hotel as man and wife, and the acts of sexual intercourse which took place there; and it is contended, that this evidence was improperly admitted. The evidence, however, concerned acts which were connected together and formed a part of the transaction that constituted the offense, for which the Plaintiffs in Error were on trial; and disclosed the motive which actuated the Plaintiffs in Error to induce the prosecuting witness to absent herself from her parents' home and become delinquent. It was not error to admit this testimony. Lyons v. People 137 Ill. 602; People v. Jarvis 306 Ill. 614; People v. Carpenter 288 Ill. 268; People v. Emmel 292 Ill. 477; People v. Chrfikof 295 Ill. 295; People v. Laures 289 Ill. 490. Nor was it error to show, by competent medical testimony the physical condition of the sexual organs of the prosecuting witness and what this condition indicated. This evidence tended to corroborate the testimony of the prosecuting witness, that acts of sexual intercourse had taken place. The court properly excluded the evidence offered, to show sexual intercouse by the prosecuting witness with other persons previous to the alleged offense;

such evidence did not in any way tend to rebut any of the elements constituting the offense; and would have raised a false issue in the case. Error is also assigned on the refusal of the trial court to allow counsel for Plaintiffs in Error to read from an opinion of the Supreme Court of Indiana in Mayhew v. The State. The case referred to related to the sufficiency of the charge laid in the indictment. The legal sufficiency of the indictment was not a matter for the determination of the jury; nor is it a province of the jury to review the action of a court in sustaining the legal sufficiency of an indictment. 16 Corpus Juris 923.

Plaintiffs in Error also made objection to certain questions put to Dr. Etchison on cross examination. Dr. Etchison was a character witness, and the questions related to efforts made by him to bring about a settlement of the case with the parents of the prosecuting witness. We are of opinion that it was error to admit this evidence but that the error is not of sufficient gravity to justify a reversal of the judgment; we think that this evidence could not have affected the determination of the jury, on the question of the guilt of the parties involved. The record does not disclose any substantial error in the admission or exclusion of evidence.

Many objections are raised to the instructions given for the People; to the modification of instructions; and to the refusal of instructions requested by the Plaintiffs in Error. It would serve no useful purpose, and would unduly extend this opinion to consider these objections in detail. They are mostly technical and metaphysical in their nature. We deem it sufficient to say, that the instructions given for the People, and those given for the Plaintiffs in Error, taken altogether, gave the jury a substantially correct idea of the law applicable to the facts proven; and that all the legal points which could legitimately be raised in defense were covered by the instructions given for the Plaintiffs in Error. The modifications made by the court were not improper or erroneous. The matters contained in the refused instructions to which the Plaintiffs in Error were entitled, were all embodied in those which were given to the jury in their behalf.

We conclude therefore, that the errors assigned in this regard to not form a legal basis for the reversal of the judgment; People v. Heard 305 Ill. 319. The evidence concerning the guilt of the Plaintiffs in Error, fully warranted the jury in reaching the conclusion that they were guilty of the charge. Under these circumstances inconsequential errors should not be regarded as a ground for reversal of the judgment. People v. Slattery 312 Ill. 202; People v. Michel 280 Ill. 11; Johnson v. People 202 Ill. 53; Wilson v. People 94 Ill. 299.

For the reasons stated judgment is affirmed.

Shurtleff, J. I concur in the conclusion arrived at as to Plaintiff in Error Arthur Day, but I dissent from the conclusion as to Plaintiff in Error E. William Hight.

Judgment affirmed.

General No.7825 April Term,1925 Agenda 4

The People of the State of Illinois,
Defendant in Error.
vs.
Chester Scott, informed against as "Pete" Scott,
Plaintiff in Error.

Error to County Court
Piatt County

239 I.A. 680

Niehaus,P.J.

In this case an Information was filed in the county court of Piatt county against the Plaintiff in error, Chester Scott, charging, that the Plaintiff in error, and one George Rinck, on the 13th day of August, did wilfully and unlawfully sell intoxicating liquor in violation of the Illinois Prohibition Act. A plea of not guilty was entered to the Information, and a trial was had which resulted in a verdict, finding the plaintiff in error "guilty as charged in the Information;" and the court thereupon rendered judgment, sentencing the plaintiff in error to pay a fine of $100.00, together with costs of suit, and committed the plaintiff in error to the state farm at Vandalia for a period of six months. A writ of error is now prosecuted for reversal of the judgment.

In accordance with the holding in People v. Barnes, 314 Ill. 140, the Information in this case, upon which the conviction of the plaintiff in error is based, is not legally sufficient to charge him with the commission of a crime. In People v. Wallace, 316 Ill. 120 the Court passed upon the question raised in this case; and it is there pointed out, that, "no waiver or consent by the defendant to a criminal prosecution can confer jurisdiction or authorize his conviction in the absence of an accusation charging him with the violation of the criminal law. (People v. Pilewski 195 Ill.58) Even a plea of guilty in manner and form as charged in the indictment or information, is an admission only of what is

well alleged. The plea confessed nothing if the information charged no criminal offense, and the defendant may question the information by a motion in arrest of judgment or upon a writ of error. (Klawanski v. People 218 Ill. 481)" ***** "The Information in this case is the foundation for the judgment; just as the declaration is in a suit at law, and equally subject to the rule that advantage may be taken of its insufficiency to support the judgment on a motion to arrest the judgment or on error." ***** "Since an accusation charging a crime is the foundation of the proceeding, without which no conviction can be sustained, the court will not, when the insufficiency of a charge is brought to its attention before final judgment, affirm a conviction."

For the reasons stated, the judgment of conviction is reversed.

Reversed.

General Number 7827 Agenda 55.

April Term, A. D. 1925.

The People of the State of Illinois,
Defendant in Error,
vs.
Charles Ball,
Plaintiff in Error,

239 I.A. 681

Error to City Court of Litchfield.

Niehaus, P J.

The Plaintiff in error, Charles Ball, was indicted in the city court of the city of Litchfield for an alleged violation of the Illinois Prohibition Act.

The charge in the indictment is, that he "did unlawfully transport intoxicating liquor in violation of the Illinois Prohibition Act." The indictment is legally insufficient as a charge, alleging the commission of a criminal offense. People v. Barnes 214 Ill. 140; People v. Martin Ib. 110. The plaintiff in error however, was tried and convicted under the foregoing indictment, and sentenced to pay a fine of $500.00, and to serve 120 days imprisonment at the state farm in Vandalia. Inasmuch as the indictment lacks the substantial requisites of a charge against the plaintiff in error for the commission of a criminal offense, the plaintiff in error could not be legally sentenced under the indictment. People v. Brown 312 Ill. 63; Klawanski v. People 218 Ill. 481; People v. Pilewski 195 Ill. 58; People v. Wallace 316 Ill.120.

The judgment is therefore reversed.

Judgment reversed.

General No. 7841. Agenda 16.

April Term, A. D. 1935.

Thomasville Chair Company, A Corporation,
Appellant,
vs.
Scoville Company, A Corporation,
Appellee,

239 I.A. 681

Appeal from Macon.

Niehaus PJ.

This is an appeal from a judgment rendered against the appellant, Thomasville Chair Company. The matters complained of are stated in appellant's brief to be as follows: "When the case was called for trial, the defendant entered its motion without notice to the plaintiff, that the court render a judgment against the plaintiff, and in favor of the defendant in this cause, and for costs of this suit, which motion was allowed by the court."

It is sufficient to say concerning the matter referred to, that the action of the court which is complained of is not a part of the common law record, and can properly be reviewed only when incorporated in a bill of exceptions. There is no bill of exceptions in the transcript of the record on file. "Recitals in the judgment orders of the court, and suggestion of counsel in their brief and argument, that certain rulings were made on motions, supported by affidavits, are not sufficient to entitle parties to a decision thereon by this court on errors assigned," People v. Cowen 283 Ill. 308; People v. Ellsworth 261 Ill. 275; Miller v. Miller 255 Ill. 360.

We find no error in the common law record. The judgment is therefore affirmed.

Affirmed.

25

Released for Record
Nov 11 - 1925

General No.7844 — April Term, A.D. 19 25 — Agenda 19.

Joseph L.Lyons, by next friend, etc.,
Appellant,
vs.
The Pleasure Driveway and Park District of Springfield, Illinois, and the John T. Walbridge Engineering Co.,
Appellees.

239 I.A. 681
Appeal from Sangamon.

Niehaus, P.J.

The appellant Joseph L.Lyons, a boy 12 years of age, by his next friend brought this suit in the circuit court of Sangamon county against the appellee John T. Walbridge Engineering Company, and the 'Pleasure Driveway and Park District of Springfield,' to recover damages for injuries suffered by him by falling on a rock pile, which is alleged, was maintained by the appellees on the premises of the Pleasure Driveway and Park District; and which is claimed, was an attractive nuisance. There were various questions raised in the lower court concerning the validity of the summons of Justice Chancellor, the agent of the Engineering Company in Cook County; the company being a foreign corporation and licensed to do business in this state, with its principal office in Chicago. But it is not necessary to discuss these various questions, inasmuch as it is evident from the record, that the Engineering Company by filing a demurrer to the declaration, submitted itself to the jurisdiction of the court, for the purpose of an adjudication on the merits; and has waived its right to question the legal sufficiency of the service of the summons.

The declaration purports to state appellant's cause of actions as follows:

> Joseph L.Lyons, a minor, by Edgar R. Lyons, his next friend, and by his attorneys, complains of the John T.Walbridge Engineering Company, a corporation, and the Springfield Pleasure Driveway and Park District, a public corporation, of a plea of trespass on the case.
>
> Avers that on, to-wit, the 21st day of October, 1922, the defendant the Springfield Pleasure Driveway and

Park District was the owner of certain lands adjacent to a certain sewer of the City of Springfield, Illinois, running through the northwest part of the city, in the vicinity of Walnut street, and had control and possession of the same for public park purposes, and the defendant the John T. Walbridge Engineering Company was then and there engaged in the work of extending said sewer, and, while so engaged, did then and there haul and place upon said lands in the vicinity of said work for use in said extension and building of said sewer a certain large pile of crushed rock, which were then and there so placed that the same was 100 feet long and twenty feet wide and ten feet high, and which was permitted to remain on said grounds of said public park, to wit, two weeks prior to the injuries complained of; that the defendants, in placing said rock on said premises and in permitting same to remain thereon, were guilty of maintaining on said premises and in said grounds and park a certain attractive nuisance to children, in this that they permitted said pile of rock to remain for a long time in said public park and in the vicinity of a large number of homes and of a public street, in an unguarded condition, and which was so piled upon said premises as to become then and there attractive to children, and was dangerous to children playing thereon; that the said Joseph L.Lyons was then and there a child of, to wit, twelve years of age, and while playing upon said pile of crushed rock, and while on the same, in the act of watching the workmen on said sewer, he, because of the dangerous condition of said pile of crushed rock fell on the same with great force and struck his face and eye against said pile of stone, at a time when he was in the exercise of all due care and caution for his safety. and because thereof his eye was greatly bruised, and lacerated and injured, and he was deprived of the sight in said eye, to the damage of the plaintiff of fifteen thousand dollars.

A general demurrer was filed to the declaration by each of the appellees separately. The court sustained the demurrer of the Pleasure Driveway and Park District, and we are of opinion that the demurrer was properly sustained. The court overruled the demurrer of the Walbridge Engineering Company, and thereafter the company filed a plea to the jurisdiction of the court, which again questioned the validity of the service of the summons upon the agent residing in Cook county. The appellant thereupon made a motion to strike this plea from the files, which motion was denied by the court; and thereupon the appellant elected to stand by his motion to strike the plea from the files, and refused to reply thereto, and the court rendered judgment upon the plea, and ordered the cause to be dismissed; also entered judgment in bar of the suit. For the reasons heretofore stated, we are of opinion, that the plea to the jurisdiction referred to should

have been stricken; and that the court erred in ordering the cause to be dismissed. It is contended by the appellees as a ground for affirming the judgment, that there is no Bill of Exceptions preserving for review the questions of error raised in the case, and in the motion to strike the plea from the files. The necessity for a Bill of Exceptions however, is here obviated by the fact that the error in making the order, and rendering the judgment, appears on the face of the record, and in the judgment itself. City of Jacksonville v. Cherry 29 Ill. App. 617. For the reasons stated, the judgment and order of the court is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

General No. 7850 April Term, A.D.1925. Agenda 25.

George A. Kizer,
Appellant,
vs.
Victory Insurance Company of Philadelphia,
Appellee,

239 I.A. 681

Appeal from Coles.

Affirmed

Niehaus, P.J.

This is a suit brought by George A. Kizer, the appellant, in the circuit court of Coles county, against the appellee, Victory Insurance Company of Philadelphia. The policy which has been denominated a "dealer's blanket policy" insured the appellant to an amount not exceeding $5000.00 against loss or damage by fire; and covered automobiles kept by the appellant in different locations in the city of Mattoon. At the time of the fire, the appellant had automobiles stored at 1412 Broadway Avenue, of the value of $11471.22; and seven automobiles of the value of $4379.32 were stored at 2008 Prairie Avenue. The automobiles stored at the Prairie Avenue place were totally destroyed by fire on the 15th day of March 1924; and proofs of loss in accordance with the requirements of the policy were duly made. The appellant sued for the total amount of his loss, namely $4379.32. The policy in question, contains the following limitation of liability for loss and damages:

> 2. This policy shall cover (subject to conditions and limitations herein contained) every automobile and - or chassis and - or tractor including bodies, tops and equipment attached to or forming part thereof, owned by the Assured, or sold but not removed and stored at one of the locations hereinafter specified while said property is in the actual possession of the Assured or in the possession of a bailee of the Assured at any location which is not excluded by the terms of this policy, provided, however, that nothing herein contained shall be construed (a) To cover any property in the hands of any purchaser under any partial payment plan, nor (b) To cover any property which is being transported by conveyance or being driven over the road, unless such property is being so transported or driven to or from one of the storage locations hereinafter named.

3. The liability of this company for loss or damage under this policy from any one casualty shall be limited as follows:

Rate 1.77 Premium $88.50

Not exceeding $5000.00 on new property at 1412 Broadway.
Not exceeding $_____ on second-hand property at 1412 Broadway.
Not exceeding $_____ on new property at 1716 Charleston Avenue.
Not exceeding $_____ on second hand property at 1716 Charleston Ave.
Not exceeding $_____ on new property at 2008 Prairie Avenue.
Not exceeding $_____ on second hand property at 2008 Prairie Ave.

and the liability of this company shall be limited to not exceeding the insured value of four automobiles, chassis or tractors, (the usual place of storage of which shall be one of the locations herein specified), while temporarily at any other location, and the liability of this company shall further be limited, in respect to property being transported by conveyance or being driven over the road, to a sum not exceeding the highest limit at any one of the locations herein specified; and the company's liability, in respect to property being transported by a common driver, shall cease when the liability of the common carrier changes to that of a warehouseman. Nothing in this paragraph shall be taken or construed to change or modify in any way the provisions hereof with reference to loss for which bailee for hire is liable.

5. The amount insured upon each article of property covered hereby shall not exceed that proportion of the total insurance under this policy which the cost to the Assured of such article bears to the total cost to the Assured of all the property covered hereby, it being expressly stipulated and agreed however, that in no event shall the liability of this Company on any property exceed the actual cash value or the actual cost to the Assured plus transportation charges, if any, but not including prospective profit or overhead charges of any nature whatsoever.

The record discloses that the appellee filed six special pleas in defense of the action, to which a demurrer was interposed by the appellant; and the demurrer was sustained to the third, fourth, fifth and sixth pleas, but overruled as to the first and second special pleas. Appellant elected to stand by his demurrer to the first and second pleas; and the appellee elected to stand by its pleas to which the demurrer had been sustained; and the court thereupon rendered judgment for $1380.15 as the limit of the liability of the appellee under the policy. From this judgment an appeal is prosecuted.

The special pleas set up the limitation of liability which is embraced in clauses 2, 3 and 5 of the policy. The court construed the clauses referred to, as limiting the liability of the appellee for the loss sustained, to the amount of the judgment, which is that proportion of the amount of insurance, which the cost

to the appellant, of the property insured and destroyed, bears to the total cost to the appellant of all the property covered by the policy. It is contended by the appellant that under a proper construction of the clause 'total cost to the assured of all the property covered by the policy,' means, all the property covered by the policy at the place where the fire occurred. We cannot agree with this contention, but are of opinion, that the construction given by the court to the clauses is the correct one, and that it is not involved in doubts; courts of review in this state have apparently taken the same view of the matter. Royal v. Hartford Fire Ins. Co. 158 Ill. App. 463; Hartford Fire Ins. Co. v. Olcott 79 Ill. 439; Illinois Mutual Ins. Co. v. Hoffman 132 Ill. 522; Hartford Fire Ins. Co. v. Peterson 209 Ill. 112.

The judgment is therefore affirmed.

Judgment affirmed.

General No. 7858 April Term, A. D. 1925.

239 I.A. 681

Sterling Midland Coal Company,
Appellant,

vs.

Chicago-Williamsville Coal Company, et al.,
Appellees,

Appeal from Sangamon.

Niehaus, P.J.

In this case a bill in equity was filed by the appellant, Sterling Midland Coal Company, on the 20th day of August, 1924, against the appellees, The Chicago - Williamsville Coal Company, and William Ryan, John W. Capp, Jr., John Sankey, George W. Hatch, Harry Devereaux, Eugene Colgan and Edward H. Buckley, as Directors of the company last referred to. The bill is based on Section 23 of Chapter 32 of the Revised Statutes, to hold the directors named liable on a judgment for $4617.06, which it is alleged in the bill, the appellant recovered against the Chicago - Williamsville Coal Company on April 14, 1924; and it is alleged in the bill that the latter company after the recovery of the judgment, had divested itself of its entire property, which consisted of a coal mine in Sangamon county, by selling the same to Leslie J.Pilliam for an amount in excess of $100000.00. The bill was amended; and an answer was filed by the appellees to the amended bill, admitting the recovery of the judgment; and that the mine had been sold to Pulliam; but denying, that the amount received from the sale was in excess of $100000.00. The answer also avers, that the judgment was obtained by the appellant "through fraud, concealment and improper doings," on the part of the appellant. Thereafter the appellee's filed a cross bill, praying for an order to restrain the enforcement of the judgment, and the levy of any execution issued thereon. The court granted a temporary injunction under a bond of $10000.00. This appeal is prosecuted from the order granting the injunction.

The allegations of the bill point out the fact, that the appellee company had a contract with the appellant company made on December 31, 1913, by which the appellant company agreed to receive and sell the entire tonnage of the coal mined by the appellee company at the highest price obtainable therefor; and that it was to receive as compensation for making such sales a commission of 8 percent of the price for which the coal was sold; and that the appellant company was to remit any pay received for the coal sold, to the appellee company after deducting therefrom its commission; and that the appellant company 'immediately after the execution of said contract began to sell coal to various persons, many of whom are unknown to your orators; and to other persons known to your orators, at prices largely in excess of and greater than the prices reported to the appellee's company as the selling price for said coal." It will be noticed, that the alleged sales by the appellant company of coal "at prices largely in excess of and greater than those reported" to the appellee company, are alleged to have been made to various persons, many of whom were unknown; but some are alleged to be known to the appellee company; but who the known persons are is not stated in the bill; nor is it stated, when sales were made to such persons who are known to the appellees, nor what amount of coal was sold to them, nor the prices at which the coal was sold. The averments in the bill in that regard are so vague and indefinite that no reasonable inference could be drawn therefrom that the appellee company was defrauded. In connection with the averments referred to, the bill alleges 'that the amount of difference between the prices at which the coal was actually sold, and the amount reported as the sale prices of said coal, was wrongfully and fraudulently converted by the appellant company to its own use and benefit; and that the appellees were defrauded of such amounts on such sales;' that "sales in such fraudulent manner continued throughout the life of said contract, as your orators are informed and believe; and so on information and belief state the facts to be,

that the said Sterling Midland Coal Company thus defrauded and cheated the said Chicago - Williamsville Coal Company and your orators out of large sums of money, to-wit, amounting to more than $100000.00." That is to say, that the charges made by the appellee company, that the appellees had been defrauded and cheated by the appellant company in manner and form alleged, is expressly stated to be on information and belief; but the information, which the appellees have on this subject is not stated. The cross bill also alleges, that "for the purpose of further carrying on said fraud and deception the appellant company falsified the books, records and reports to the Chicago - Williamsville Coal Company, and wholly concealed from that company any knowledge of such fraud and deception and wrong; and has since said time wrongfully, fraudulently persisted in said concealment and fraud, so that your orators until within two weeks have been in ignorance thereof; and your orators further allege that upon learning said practice within the last two weeks, they have checked the number of sales made by the Sterling - Midland Coal Company and have discovered, and are in possession of proofs to show that the Sterling - Midland Coal Company did practice said fraud and sell said coal at prices ranging from 25 cents upwards per ton in excess of those prices reported to the Chicago - Williamsville Company." It will be noticed that just what the discoveries of fraud were which the appellees made within the two weeks before the filing of the cross bill, are not stated; nor is it stated, what the proofs are of which the appellees claims have become possessed of, and which in the opinion of the appellees show, that the appellant company "did practice said fraud and sell said coal at prices ranging from 25 cents upward per ton in excess of those prices reported." The rule concerning the legal sufficiency of allegations of fraud is clearly defined in Murphy v. Murphy 189 Ill. 360: "In alleging fraud it is well settled both at law and in equity that the general averment without setting the facts upon which the charge is predicated is insufficient *** it is essential

that the facts and circumstances which constitute it (the fraud) should be set out clearly, concisely and with sufficient particularity to apprise the opposite party of what it is called upon to answer. (9Ency of Pl. & Pr. pp 686-687; Brooks v. O'Hara 8 Fed. Rep. 529; Jones v. Albee 70 Ill. 34; Klein v. Horine 47 Ill. 430.) The averments in the cross bill referred to, do not meet the requirements of the rule, and are clearly insufficient. There is another fatal defect in the cross bill; it appears from the fact of the bill that there was a lack of diligence on the part of the appellees to ascertain the alleged fraud before the recovery of the judgment; and to put in a defense on that ground against the recovery of the judgment; The bill of complaint alleges, that the appellant began its alleged fraudulent practices immediately after the execution of the contract for the sale of the coal, and continued them from that time on, until Dec. 31,1918. The judgment was obtained April 14,1924. It cannot justly be contended, that the appellees exercised diligence under these circumstances to ascertain any fraud that may have been committed in the selling price of coal. In business transactions covering a period of over five years, the sales made could readily have been verified at any time by the exercise of ordinary business prudence in the current course of the business. Equity will not relieve against a judgment at law in cases where fraud is alleged, unless the party applying for relief is free from negligence in asserting his defense. Harding v. Hawkins 14 Ill. 572; Kretschmar v. Ruprecht 230 Ill. 492; Hollister v. Sobra 264 Ill. 535; Brady v. Hovarth 79 Ill. App. 17.

For the reasons stated, the cross bill is legally insufficient as a basis for the restraining order issued; and the order is therefore reversed.

Order Reversed.

General No. 7866. Agenda 52.

April Term, 1935.

W. J. Edelbrock and Henry E. Edelbrock,

Appellees,

vs.

Alva Rexroat,

Appellant,

239 I.A. 682

Appeal from Morgan.

Niehaus, PJ.

This is an appeal from a judgment for $860.90 rendered in the circuit court of Morgan county against the appellant Alva Rexroat, and in favor of the appellees W. J. Edelbrock and Henry E. Edelbrock.

There are seven assignments of error; but the errors assigned cannot properly be considered or determined without a consideration of the evidence in the case, contained in the Bill of Exceptions. The Bill of Exceptions has been stricken from the files; and the evidence contained therein is not before us for consideration.

Under these circumstances the judgment must be affirmed.

Judgment affirmed.

General No.7365 April Term, A.D.1925 Agenda 34.

Robert Johns,
Appellee,
vs.
Providence Washington Insurance Company,
Appellant,

239 I.A. 682

Appeal from Christian.

Niehaus,P.J.

In this case the appellee, Robert Johns recovered a judgment in the sum of $2000.00 in the circuit court of Christian county, against the appellant, Providence - Washington Insurance Co. for a fire loss sustained by him. The recovery was based upon a fire insurance policy issued by the appellant to the appellee, through appellant's agents, Baldwin & Baldwin. The policy was issued Dec. 30,1922, and insured the buildings described therein for one year; and was in effect as a renewal of an insurance risk, which had been carried by the appellant company for many years; and handled through the agency mentioned. The building insured was destroyed by fire May 9, 1923; suit was commenced on the policy Aug. 11,1924. It is pointed out by the appellant, that the policy contains the following limitation on the right of recovery: "No suit or action on this policy, for recovery of any claim, shall be sustainable in any court of law or equity until after the full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." The contention is, that inasmuch as the suit in question was not commenced by the appellee within twelve months next after the fire, that appellee's right of recovery is barred. With reference to this contention, it is sufficient to say, that the evidence justifies the inference, that appellant's agent, through whom the appellee had transacted the business of procuring and continuing in force the insurance in question, misrepresented to the appellee the fact, that he had renewed the policy in the appellant company on the building destroyed; and so the fact that he had a

right of recovery against the appellant for the loss sustained, was by the false representation of appellant's agent, concealed from appellee; and that he was thereby misled, and prevented from enforcing his claim within the time fixed by the limitation. Under these circumstances, we are of opinion the limitation did not become legally effective to bar appellee's right to recover against the appellant; but under the provisions of the statute, he could bring his action at any time within five years, after he had discovered his cause of action against the appellant company. Sec. 22, Chap. 83, Cahill's Revised Statutes; Cooper v. Cooper 152 Ill. 80; Leohard v. Springer 197 Ill. 532; Bishop v. Thompson 196 Ill. 206; Griffith v. Parks 165 Ill. App. 337; Smith v. Niemann 216 Ill. App. 179. The evidence is conclusive on the point, that appellee did not discover, that appellant had issued the policy in question and that he had a cause of action until May 8, 1924; and it is apparent therefore, that his case was commenced within the period of statutory limitation.

The record does not disclose any error, and judgment is therefore affirmed.

Judgment affirmed.

General No. 7874. APRIL TERM, A.D. 1925. Agenda 40.

Maude E. Beebe,
Appellee.

vs.

Doris Kirkpatrick and
Esther Havens,
Appellants.

239 I.A. 682

Appeal from McLean.

Niehaus,PJ.

In this case a bill in equity was filed in the circuit court of McLean County by the appellee, Maude E. Beebe, against the appellants, Doris Kirkpatrick and Esther Havens, to enforce an alleged legal liability against them, as heirs of Henry S. Dooley, deceased, and to compel payment of certain notes constituting a mortgage loan, from the real and personal property inherited by them, and which came into their possession from the estate of the deceased; the deceased having guaranteed the payment of the loan referred to. The lower court sustained a demurrer to the bill, and dismissed it for want of equity. The order sustaining the demurrer, and dismissing the bill however, was reversed by this court on a previous appeal, with the direction to overrule the demurrer. Beebe v. Kirkpatrick 214 Ill. App. 157. Upon a re-instatement of the case in the Court below, and the issues settled, it was referred to the Master in Chancery; and the Master heard the evidence and reported his findings thereon to the court. The Master found in favor of the appellee; and that she was entitled to the relief prayed for. The appellants excepted to the findings, and upon a hearing before the court, the exceptions were overruled; and a decree was entered in accordance with the findings of the Master; and thereupon the court directed that each of the appellants pay to the appellee the sum of $1813.75, together with interest thereon; and that they pay the costs of the suit.

This appeal is prosecuted from the decree.

The facts and circumstances relied upon, as constituting a legal basis for the liability of the appellants, are set forth in the bill of complaint, and are referred to at length in the opinion of this court on the previous appeal; and this court necessarily disposed of the questions of law involved in this controversy in passing on the legal sufficiency of the bill; and in holding that the appellee under the allegations of fact in the bill, was entitled to the relief prayed for; the only question therefore, which is apparently open for discussion and consideration by this court on this appeal, is whether the facts alleged in the bill were proven. Concerning this question, it may be said that an examination of the evidence contained in the abstract leads to the conclusion, that the necessary proofs were made, but inasmuch as the abstract fails to show, that it contains all the evidence, the appellants are precluded from raising any question concerning the weight or sufficiency of the evidence. People v. Kozlowski 315 Ill. 104. The decree is therefore affirmed.

Decree affirmed.

General No.7877 April Term,1925 Agenda 43

O.P.McGahey,
Appellee

vs.

The Pennsylvania
Railroad Company,
Appellant.

239 I.A. 682

Appeal from Coles.

Niehaus,P.J.

The appellee, O.P.McGahey, commenced this suit in the circuit court of Coles county against the appellant, Pennsylvania Railroad Company, to recover damages for personal injuries sustained by him, and for damages for the destruction of his automobile in a collision with a train operated by the appellant. The collision occurred on the 9th day of May, 1924, at a crossing in Douglas county, near the Embarrass river, where the Springfield road crosses appellant's tracks. The declaration charges general negligence in the operation and management of the train, which is alleged to have caused the collision; it also charges a failure to give the required statutory signals of warning of the approach of the train. There was a trial by jury, which resulted in a verdict finding the appellant guilty, and assessing appellee's damages at $2900.00. Judgment was rendered on the verdict, and this appeal is prosecuted from the judgment.

It is contended on appeal, that the evidence is practically conclusive against the appellee on the charge made in the declaration that no bell was sounded, and no whistle blown as the statute requires; and that therefore, the court should have granted appellant's motion to direct a verdict for the appellant, which motion the court denied. While it is true, there were more witnesses who testified, that the statutory signals were given, it is also true, that there was positive evidence, that the signals were not given; and under these circumstances it be-

became a question of the credibility of the witnesses; and the determination of this question was one peculiarly for the jury; the refusal of the court to direct a verdict under these circumstances was not error; nor should a court of review reverse the judgment unless it clearly appears, that the verdict of the jury was manifestly against the weight of the evidence. The physical conditions and surroundings at the place where the collision occurred, are described in the testimony of J.R.Tuttle, a witness for appellee, as follows:

> "As you approach this crossing from the south after you made the turn at the base of the hill and go north you could see a train about the tank. The tank is about 200 feet from the crossing. You could not see a train very far west of the tank. You would be practically on the track where you would see a train at the tank 200 feet west of the crossing. The stop sign is located fifteen feet south of the south rail. I have made a test by stopping my automobile or attempting to stop it at this stop sign.
>
> At the stop sign you couldn't see a train approaching from the west. Your right front wheel would be on the rail before you could see a train coming from the west. When you stop at the stop sign the embankment on the south side obstructs your view. The embankment runs from four to nine feet high. The top part of the embankment is about twenty feet from the south rail. The bottom about eight feet. On the 9th of May, 1924, there was sweet clover, brush, weeds of most all kinds growing on the embankment. This vegetation ran all the way from two to four feet high. This vegetation grew on the side of the embankment and in the ditch as close as the cinders to the track.
>
> This was four or five feet from the track. In the southwest angle of the crossing there was trees, locusts of all kinds and shrubbery of all kinds to obstruct the view of the driver on the highway. There were trees located along that right of way fence south of the tank along there, hickory trees that had not been topped and branches reached out over the right of way fence several feet. From the turn south of the railroad crossing until you get to the railroad tracks there is a grade about 25 or 30 feet. From ten to twenty feet south of the railroad tracks there is a hump in the road. I judge this hump is about 3 or 4 feet. You cannot stop an automobile in that place handy."

And the appellee testified to the same effect concerning the same matter;he also testified concerning the alleged failure to blow the crossing whislte or ring the engine bell.His testimony on these points

is as follows:

"It is about 175 feet from where road commences to curve to railroad. As I came around the curve I drove up the hill and coming up the hill I watched for train and listened for a train all the way. When I came to the curve in the road I was looking northwest. I continued to look to the west as I approached the crossing I drove on up the hill. I was listening too. At that time no whistle was blown and no bell rung. I did not see the train coming from the west until I got so close to the track that I was in what I would call a death trap.

I started north from the curve at about fifteen miles an hour, as I went up the hill I reduced the speed considerably. I was going very slowly. I came practically to a stop at the stop sign, threw out my clutch and raced my engine and started on then, then is when I saw the train and then is when my front wheels were practically on the track.

Where I came practically to a stop was at stop sign. I would say it was 15 feet from the track. As I came up to the crossing just before I crossed the bridge I let the left window down, that window was down as I went around the curve and up to the track, that was on the west side. At the stop sign I looked both ways I could not see any train towards the west. There was an embankment and growth of vegetation, couple of telephone posts. Of course I did not notice these things in particular at that time. I knew there were obstructions there and I could not see the train.

The embankment was on the railroad right of way. The embankment was between the railroad and the fence on the south. I would say this embankment west of the road and south of the track was five feet high.

The embankment varied as it went west, got a little higher all the time.

The highest point would be down a short ways, west of the tank, or rather right along by the tank, maybe a little ways west. I would say at that point it was eight feet high or better. The embankment extended as far west as the tank, I would day 200 feet. On the embankment west of the road and south of the tracks there was a growth of vegetation. I think I saw it two weeks after I was hurt.

The vegetation was clover, sumac, blackberry bushes, locust sprouts, small growth of locusts, number of weeds I couldn't name. On the day of the accident it was a little over two feet high. The bee clover I would say was as much as two feet or better. I dont think there was any growth there below two feet. I think there was plenty of growth more than two feet. There must have been some four foot high. This clover, blackberry bushes and weeds grew on the slope of the embankment both ways. The heavy growth was on the side next to the track. The embankment, I would say, was nine feet from the track and the growth on the inside of that. As I came around the curve there was shrubbery and trees that obstructed my view. They were to the west of the road.

There was shrubbery all over the hills there and on back, regular forest. This was between me and the railroad track. There was a hill to the west of us. I was looking in a northwesterly direction and the hill was between me and the railroad. This shrubbery and trees all over that section there. There were trees at that point south of the tank. The branches extended out over the right of way.

These trees are what I would call second growth hickories, they were bushy, the trees that were close to the road on the side of the hill, I would call them second growth hickory, they were bushy and not very high. Along the right of way I had seen sumac and blackberry bushes and scrubby locusts. I think there was a growth of nearly every kind of shrubbery you would find in that section of the country, some blackberry thickets.

There was one place as I came up the road that I could have seen through. That was in near the tank. That was down at the turn, down in the turn at the bottom of the hill or close to the bottom of the hill. I would say it was about 175 feet from the track. At that point I looked. I saw no train. Could not see a train any further west than that. As I came up the hill and got even with Mr. Annin's house on the hill to the right, I could have seen a train, but at that point you are coming to this embankment and these shrubs and trees, so that it obstructs your view. The embankment and trees obstructed the view to the west so that I couldnt see the train."

It is insisted, that appellee is precluded from recovering in the case because he failed to come to a full stop at the "stop sign;" that the stop sign was placed near the crossing in compliance with an order of the Utilities Commission, after the Commission had designated the crossing as "extra - hazardous;" and it is contended, that a failure to comply with a statutory safety requirement is prima facie evidence of negligence. There is another factor however, which must be considered as entering into the determination of the question of the appellee's right to recover in connection with the failure to come to a full stop at the stop sign, namely, whether such failure to stop, considered as negligence, was a contributing cause to bring about the collision; this is a question of fact for the jury to determine. Jeneary v. C. & I. Traction Co. 306 Ill. 392.

It should also be noted in this case, and in this connection, that no proof was made, that the stop sign was one which

had been put up in pursuance of the order of the Commission; nor, that the sign complied with the specifications of the Utilities Commission in reference to size, form and character of the sign, to constitute a legal stop sign. Appellant's contention therefore, concerning appellee's failure to come to a full stop at the stop sign, is not a ground for reversal of the judgment.

The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.

General No. 7882 April Term, A.D.1925 Agenda 46.

Wells Brothers,
Appellee,
vs.
C.D.Veatch and
Mrs. C.D.Veatch,
Appellants,

239 I.A. 682
Appeal from McLean.

Niehaus,P.J.

This is an appeal from a judgment for $155.00 rendered in the circuit court of McLean county, in favor of the appellee, Wells Brothers; and against the appellant, C. D. Veatch. The judgment was rendered on a directed verdict. The directing of the verdict in favor of the appellee is assigned as error.

It is contended by the appellant, that the direction of the verdict was error because there was some evidence tending to show the appellant did not owe the amount for which judgment was rendered. The appellant himself had testified, that he did not owe the appellee anything; but it must be pointed out in this connection, that appellant's statement in that regard from an evidenciary standpoint amounts merely to a conclusion; and that he did not state any facts from which the inference could reasonably be drawn, that he did not owe appellee anything. On the other hand, prima facie proof, had been made of appellant's indebtedness on certain checks, which were in evidence. Appellant admitted his indebtedness on the checks; also admitted the correctness of the debit and credit items of appellee's book account, which had been put in evidence; and his only reason for saying that he did not owe $150.00, was that he had given direction that the checks amounting to $150.00 for which he was liable, should be paid out of the deposits of monies which he had made to the appellee; which monies had been applied by appellee to liquidate other admitted indebtedness of the appellant. In this state of the record, it is apparent,

that even though the checks referred to, might be considered as paid by the application of the money deposited, it would nevertheless follow, that appellant then owed the same amount on the book account. The only objection made to the introduction in evidence of the book account, was to the effect, that the book containing the account is not a book of original entry. The proof is, that all the items were originally entered in this book; and the entries made in the regular course of business; the mere fact, that the book was kept in ledger form, has no legal significance. For the reasons stated, we are of opinion that the court did not err in directing the verdict; and the judgment is therefore affirmed.

Judgment affirmed.

General No. 7748 April Term, A.D.1924 Agenda No. 49.

Joe C. Dawson,
Appellee,
v.
O. A.Sinclair,
Appellant,

239 I.A. 683

Appeal from the
Circuit Court of
Douglas County.

Shurtleff,J.

On petition for rehearing the opinion of the court is rewritten and conclusion arrived at formerly adhered to. The controversy in this case arises out of charges made by appellee against appellant and one Casey for automobile supplies, driving and merchandise claimed to have been furnisehd by appellee to appellant between August, 1918, and May, 1922. The witness Casey went to Douglas County in 1918 and secured various leases upon lands for the purpose of drilling for oil and was in the county engaged in that work until as late as September, 1920, or June, 1921, and the testimony tends to show that during that time Casey had supplies, service and merchandise that was unpaid, from appellee, amounting to the sum of $373.61, and appellee claims to have sold a large water tank to Casey which appellee denies ever receiving back, of the value of forty dollars, but the Witness Casey testifies that he borrowed the tank and had paid appellee for all supplies, service and merchandise received from him. There is no denial of any item in the account and no claim that the water tank was ever returned to appellee. The testimony tends to show that appellant was at appellee's place of business at different times while the witness Casey was doing work and purchasing supplies from appellee, and appellee testifies that appellant stated to him that he and Casey were partners and that appellant would see that the bills were paid.

The testimony tends to show that appellant was in Douglas County in June, 1921, and employed appellee to move the drilling machine to the Jones farm. Casey was then engaged in the work and while appellee testifies that this transaction occurred in June, 1920, the books kept by appellee show that the tank was charged June 13, 1921, and the items of labor for moving machinery were charged in March, 1922, and were substantially paid for at that time. Other witnesses testified that appellant stated that he was a partner of Casey. Appellant testifies that he was at Newman, where appellee's place of business was located in 1920; that he had known the Witness Casey for several years and knew of his operations at Newman in Douglas County in 1918, and that the matter was brought to his attention in the early part of 1919 and that he interested some of his friends in the matter and himself contributed one thousand dollars to Casey's enterprise and later had raised other moneys in his behalf. Some time between June, 1921, and January, 1922, Casey, having failed to secure oil, abandoned the work, leaving his car in storage with appellee and the machinery on the ground in Douglas County. As early as January, 1922, appellant came to Newman and there is testimony tending to show that he engaged appellee to place some refittings upon the car Casey had been using, and appellant procured an uncle of appellee to drive him and secured renewals of the Casey leases that were maturing and pursued the business of drilling for oil on the same lands and with the same machinery Casey had used. There are charges on appellee's books between January, 1922, and May 16, 1922, against "O. A. Sinclair Oil Co." "Sinclair Oil Co." and "Douglas Oil Co.," amounting to $27.29 for repairs and storage of the Ford car and additional charges of $146.04 for supplies, service and labor, charged in the accounts entitled as set out, but which the testimony tends to show were furnished to appellant. The amount of the different

accounts set out in this opinion are the balances, after deducting certain credits, which it is conceded by appellee were paid by Casey and appellant and which were credited upon appellee's books. It is conceded by appellee that the items charged to Casey were purchased by Casey, and that the basis of appellant's liability, if any, is that appellant and Casey were partners. Appellant denied that he had ever been a partner with Casey and that he had ever purchased any of the supplies from appellee. It is appellant's contention that after he went to Newman in January, 1922, he employed Charles Taylor, an uncle of appellee, to drive his car and that all such work, as well as supplies, gas, oil and other matters furnished, were upon the understanding that Taylor and appellee were to have stock in the oil company when it was incorporated. Appellee brought suit on the common counts against appellant to recover a balance of $896.94 for merchandise and services. There were pleas of the general issue and there were further pleas, first of the Statute of Frauds, that appellee was seeking to recover Casey's indebtedness to appellee upon appellant's verbal promise to pay the same, and a further plea of accord and satisfaction in that appellant turned over stock in the Douglas Oil Company for five thousand dollars, of the value of five hundred dollars, in full settlement of the claim, and there was a further plea of the Statute of Limitations. There was a further issue as to an attachment in the case but inasmuch as the verdict and judgment were in appellant's favor upon that issue and no cross errors are assinged, we omit that part of the case. There was a verdict and judgment for appellee in the sum of $586.86 and appellant has appealed.

It is apparent from this record that the jury in its verdict and the court in entering judgment, took into consideration the account incurred by Casey and allowed portions of that account to appellee upon the theory that appellant and Casey were partners

and appellant contends, under the authority of Coates v. Preston, 105 Ill. 470; Sandusky v. Sidwell, 173 id. 496; Finch v. Caligher, 181 id. 631; Sherburne v. Hyde, 185 id. 580; Fleming v. Ross, 225 id. 149; and Vol. 1 American Law Reports, page 1601, note, that if appellee seeks to recover in this case upon the ground that Casey and appellant were partners, then the debt, being a joint debt and not joint and several, appellee should have sued both of the partners, and that appellant can raise the defense under the general issue.

It seems to be the holding of all the cases, after some contrariety of construction, that section 3 of chapter 76 (Smith-Hurd's Rev. Stat.) does not apply to partnership debts and obligations, and the construction made by the court in the cases cited has been enacted into statutory law by the Legislature, chapter 106½ (Smith-Hurd's Rev. Stat.) passed and approved June 28, 1917, governing partnerships. We cannot concur in appellee's contention that section 13 of chapter 106½, cited supra, providing that: "Where, by any wrongful act or commission of any partner, acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred," effects a joint and several claim under the provisions of section 15 A of chapter 106½, supra, or that section 14 of the same chapter, covering the misapplication of property of third persons, and thereby rendered a joint and several claim under said section 15 A, applies to the facts in this case or contemplates an ordinary trading indebtedness or obligation. Section 13 apparently has reference to actions in the nature of torts, and section 14 to breaches of trust and confidence, and section 15 B, provides that "all partners are liable jointly for all other debts and obligations of the partnership."

However, appellant, to have taken advantage of this objection, should have pleaded in abatement. Ross v. Allen, 67 Ill. 317; Sincheimer v. Skinner Mfg. Co., 165 id. 121; Rutter and Co. v. Mc Laughlin, 257 Ill. 201; Wilson v. Wilson, 125 Ill. App. 389; Rutter & Co. v. McLaughlin, 169 Ill. App. 432, and Cummins v. The People, 50 Ill. 135. In the last case, Cummins v. The People, supra, it was said by the court:

"It is admitted if the defendants in error had not alleged in their declaration that the defendants therein, together with Argo, executed the bond, the defendants would have been required to plead his non joinder in abatement," and in Wilson v. Wilson, supra, the court said (page 389):

"The court refused to permit appellant to prove that during part of said first period of service Frank A. Wiley and appellant jointly owned and operated the plant. The rule at common law is that if a person be omitted as defendant who ought to be joined in an action on a contract, advantage of the omission can only be taken by a plea in abatement, unless the joint liability appears from plaintiff's own pleading. 1 Chitty's Pl., 46; 1 Saunder's Pl. & Ev., 10; Rev. Stat. chap. 1, sec. 4; Conley v. Good, Breese, 135; Lurton v. Gilliam, 1 Scam., 577; Puschel v. Hoover, 16 Ill. 340; Thompson v. Strain, 16 Ill. 369; Pearce v. Pearce, 67 Ill. 207; Ross v. Allen, 67 Ill. 317; Sincheimer v. William Skinner Mfg. Co., 165 Ill. 116. Proof that another is liable with defendant does not tend to establish the general issue. The fact that the joint liability is not claimed to cover all the items of plaintiff's demand, does not abrogate the rule requiring that defense to be set up by a preliminary plea which gives the plaintiff a better writ, if he choose to avail of it. As defendant did not plead this defense in abatement, this proof was properly rejected."

Appellant urges that he could not plead a partnership in abatement when there was no partnership and cites Hamilton v. The Century

Mfg. Co., 180 Ill. App. 100, as authority that appellant can urge joint liability under the general issue. In Hamilton v. The Century Mfg. Co., supra, a suit was brought against several defendants as jointly liable, and section 54 of the Practice Act was construed and it was merely held that where plaintiff's proof affirmatively showed that no joint liability existed under the contract the defendants could take advantage of that defense, under the general issue, without pleading no joint liability. That is not this case. It is true in the case at bar that if there were no joint liability between appellant and Casey, appellant could not plead in abatement. Neither could appellee recover a judgment in this case against appellant for the charges against Casey if they were not partners and jointly liable for the same, and that was one of the contested issues of fact in the case. If such partnership did exist and they were partners when Casey purchased the goods, then appellant was liable for the same, and appellant and appellee both submitted instructions, which were given to the jury, upon that issue and tried the case upon that theory. Appellant's second instruction given to the jury was as follows:

"And in this case, though you may believe from the evidence that the plaintiff rendered services which were of value and beneficial to the defendant, still if you further believe from the evidence that such services were rendered without the knowledge or request of the defendant and that he has never agreed to pay for the same, then if you so believe from the evidence, the plaintiff cannot recover for such services unless you further believe from the evidence that the defendant and the witness, Casey, were in partnership in and about the getting of leases and the sinking of oil wells and that such materials and labor were furnished for said partnership at the request of the witness Casey."

Appellant strenuously contends that the latter part of the instruction was a modification and addition by the court to the instruction as submitted by appellant. We have very carefully examined the abstract, as prepared by appellant, and the record and no such modification or addition is shown in either. The assignment of error is without merit. What we have said covers the errors assigned as to the promise to pay being without consideration and the promise to pay the debt of another with no note or memorandum thereof being in writing. Appellant urges that the verdict is clearly and manifestly against the weight of the evidence. We have examined the record very carefully and read all the testimony, including appellant's, and we are not prepared to say that it is clearly and manifestly or even preponderates against the verdict. There is practically no denial of any specific item or that it was furnished by appellee. Casey merely testifies that he paid all of his bills. Appellant's version of the supplies furnished to him was that he employed Charles Taylor to drive his car and sometimes the supplies were put in by Taylor and sometimes by appellee, but always at appellee's place of business. It is claimed by appellant that Casey had an arrangement with Charles Taylor to take pay in oil stock when the company was incorporated for driving him, and appellant testifies that he had a conversation with appellee in Chicago and that appellee wanted "a settlement more complete in the business with Casey and his oil venture," and appellant further states: "I said, of course, I was under no obligation but I could help him and would, may be. I put into that certificate the same amount that he had from Casey for the work done for him and I just doubled it up and made the certificate $10,000 instead of $5,000." It does appear in the record that Charles Taylor assisted Casey in securing some leases and was to be compensated in stock in an oil company and a certificate of stock was offered in evidence, issued by the Old Oak Oil Company,

for five thousand dollars to F. J. Casey under date of August 21, 1921, the certificate being signed by F. J. Casey, President, and on the back it is assigned in blank by F. J. Casey with a paster showing on the photograph in the record over the place where, evidently, the assignment was dated. There is another certificate for stock in evidence, issued by the Douglas Oil Company to Charles A. Taylor under date of March 1, 1922, and the same is signed by appellant as president, and this certificate of stock, appellee testifies, was handed to him by Casey when appellee was in Chicago. He states: "Casey asked me over to the bank and I went over and he filled out the stock certificate, put it in an envelope and told me to give it to Taylor." A receipt for the certificate was signed by Charles O. Taylor for the stock to O. A.Sinclair, appellant, for the sum of ten thousand dollars, and reciting that it was in lieu of interest in leases acquired as per list attached. Appellee testifies that he never had an arrangement with anyone to take stock or an interest in the oil business for his accounts and never had any connection with this certificate except at Casey's request to deliver it to Taylor. The testimony, if appellant is to be given credence, indicates that in March, 1922, appellant was carrying out Casey's contracts in Douglas County and if the testimony of appellee is true he never had anything to do with the certificate and its form and the receipt corroborate appellee.

Appellant complains that the court erred in its rulings on the admission and rejection of evidence. There were some rulings in minor matters not strictly correct, none however, in the opinion of this court, that constitute reversible error.

Appellant assigns error upon the giving and refusing of instructions. What we have said covers appellant's objections to appellee's first and third instructions and the modification claimed to have been made by the court to appellant's second instruction.

Appellant assigns error upon the court's refusal to give appellant's sixth instruction as follows: "That before there can be a contract between two parties, the minds of the two parties must come together and agree upon all the terms and conditions of the contract: or, as is sometimes said, the minds of the contracting parties must meet." This instruction omitted the element of agency in the making of contracts and that one partner is an agent of his co-partner in the making of contracts, as applied to the purchases made by Casey. Appellant contends that the verdict is for forty dollars more than the proofs show appellee had accounts or charges for upon his books, and that forty dollars was simply added by a "country jury" for "good measure." In this, appellant is in error. The books showed in addition to the credits, accounts and charges against Casey, $373.61; accounts and charges against appellant for storage and repair of Casey's car, amounting to $27.29, and there were additional charges against appellant amounting to $146.04. making a total of $546.94. In addition to this, appellee had charged on his books under date of June 13,1921, one big water tank, forty dollars, which appellee testified he sold to Casey and which Casey testified he tried to buy, but that appellee would not sell it but loaned to him. There is no testimony showing that Casey or appellant ever returned the tank and the evidence preponderates very clearly that appellant had the benefit of this water tank. Under the circumstances, we know of no reason why the jury should not allow appellee the value of this useful article, which the jury did, making the total of the accounts $586.94. The verdict was for $586.86, an inconsiderable amount in difference, nevertheless the jury saw fit to remit eight cents from the proofs, to appellant.

Finding no errors in the record that warrant a reversal of this verdict and judgment, the judgment of the Circuit Court of Douglas County is affirmed.

Affirmed.

Rehearing Denied Dec 16 - 1925

Gen. No. 7849 April Term, A. D. 1925. Agenda No. 24

239 I.A. 683

Charles Hoke,
Appellee,
v.
Dan Perrigo,
Appellant,

Appeal from Circuit Court of Adams County.

Shurtleff, J.

This is an appeal from the Circuit Court of Adams County growing out of a replevin suit brought by appellee to recover possession of seven hogs. There have been two trials, one in justice court and a trial de novo on appeal in the Circuit Court. There have been two verdicts and judgments in favor of appellee and appellant brings the record to this court for review.

Appellant and appellee are adjoining land owners and each raise and purchase a considerable drove of hogs, kept in adjoining fields, for shipping, feeding and butchering purposes. In the testimony there is a sharp controversy as to the ownership and identity of the hogs replevined. Appellant assigns error upon the giving of certain instructions.

The third instruction for appellee informed the jury that:

"Although the preponderance of the evidence is not always determined by the number of witnesses testifying in a case, yet, if in a case there are only one or two witnesses who testify to a given state of facts, and three or four witnesses of equal candor, fairness, intelligence and truthfulness and equally well corroborated by all other evidence, and who have no greater interest in the result of the suit, testify against such state of facts, then the preponderance of the evidence is determined by the number of witnesses."

The giving of this instruction was error. It undertakes to determine the preponderance of evidence for the jury. The instruction is misleading and is not limited to the matters or issues about which the witnesses testify, nor does it take into consideration the means of observation or equal opportunities of the various witnesses for seeing and knowing the facts about which they testify. The faculty of a witness for correct observation and his opportunity for knowing the matters about which he testifies are potent factors in determining the trustworthiness and reliability of his testimony and have an important bearing upon the evidence; for witnesses may be equally candid, fair, intelligent and truthful, equally corroborated and have equal interest or lack of interest and still not be as credible as those whose means of observation or whose opportunity for knowledge is greater. (C. B. and Q. R. R. Co. v. Pollock, 195 Ill. 162.) The instruction ignores and eliminates from the consideration of the jury the force of probative circumstances appearing upon the trial and was error in this case. (Cunningham v. Ill. Cent. R. Co. 179 Ill. App. 514; Larsen v. Ward Corby Co. 198 Ill. App. 113; Walsh v. Chicago Railways Co. 294 Ill. 595; City of Chicago v. Lederer, 274 Ill. 590.)

Appellee's seventh instruction informed the jury that:

"The credit of a witness depends upon two things: his ability to know what occurred and his disposition for telling the truth as to the occurrence. The statment of a witness having superior opportunities for knowing what took place and superior intelligence or memory, other things being equal, is entitled to the greater weight before the jury."

This instruction was misleading and invaded the province of the jury in determining the credibility of the witnesses. This instruction was condemned in Himrod Coal Co. v. Clingan, 114 Ill. App. 576, and the court said:

"These instructions should have been refused. 'It is the peculiar province of the jury, where the evidence is conflicting, to properly weigh all the evidence and determine for themselves and the weight of the evidence may be. We do not understand that it is the province of the court to tell the jury which is the strongest or which is of greater force. 'L. N. A. & Co. Ry. Co. v. Shires, 108 Ill. 617. It is obvious error for the court to announce to the jury what is better evidence in a case, or what the jury may so regard. It is the province of the jury to say to what evidence they will attach the greater weight in case of conflict and with this right or privilege the court should not interfere. C. & A. R. R. Co. v. Robinson, 106 Ill. 142." See also Beckstrom v. Krone, 125 Ill. App. 381; Johnson v. People, 140 Ill. 350.

In Keller v. Hansen, 14 Ill. App. 642, Mr. Justice McAllister laid down the rules by which the credibility to be given the testimony of witnesses should be determined. He said:

"The tests by which the direct testimony of witnesses should be weighed by the jury are given by one of the most philosophical of writers upon the law of evidence, as follows: 'The credit due the testimony of witnesses depends upon, first, their honesty; secondly, their ability; thirdly, their numbers and the consistency of their testimony; fourthly, the conformity of their testimony with experience; and fifthly, the coincidence of their testimony with collateral circumstances. 1 Starkie, 544.'"

Our Supreme Court has adopted this definition in Johnson v. Farrell, 215 Ill. 549, and Tri-City Ry. Co. v. Gould, 217 Ill. 321, and instructions to juries upon determining the weight to be given testimony should conform to the rules laid down.

Appellee's ninth instruction informed the jury that: "You are the judges of the credibility of the witnesses and of the weight to be attached to the testimony of each and all of them; and you

are not bound to take the testimony of any witness as absolutely true, and you should not do so, if you are satisfied from all the facts and circumstances proved on the trial, that such witness is mistaken in the matter testified to by him, or that for any other reason his testimony is untrue and unreliable."

This instruction is erroneous because it permits the jury, if they were so inclined, to find a reason, independently of the evidence, to discredit or disbelieve any witness in the case. The phrase, "or that for any other reason," should have been qualified by the clause, "arising out of the evidence or the circumstances in evidence." Fowler v. Cade, 214 Ill. App. 155; Hartford Life Ins. Co. v. Gray, 80 Ill. 28; Ryan v. The People of the State of Illinois, 122 Ill. App. 461, and Balenovic v. Ansick, 181 Ill. App. 663. In the latter case, where a similar instruction was given, the court said:

"This instruction informs the jury they are to determine on which side the preponderance of the evidence lies from the 'facts shown by the evidence and from all other facts and circumstances,' which left the jury to roam around among facts not in evidence in order to determine where the preponderance of the evidence was. While in this case such a course would undoubtedly appeal strongly to the jury, the law is and the jury should have been instructed, that they could only consider facts in evidence. This instruction alone is sufficient to make a reversal of the judgment imperative."

There were some other errors assigned upon the giving of other instructions which doubtless will be corrected on a retrial of the case. For the error in giving the instructions set out in this opinion, the judgment of the Circuit Court of Adams County is reversed and the cause remanded.

Reversed and Remanded.

General No. 7864 APRIL TERM, A. D. 1925. Agenda No. 60

Oren Easton, Administrator of the Estate of Lewis Easton, deceased,

Appellant,

v.

Glenn W. Ward,

Appellee.

239 I.A. 683

Appeal from the Circuit Court of Cumberland County.

Shurtleff, J.

Appellant brought this suit as administrator of the estate of Lewis Easton, deceased, to recover for injuries causing death claimed to have been committed by the negligence and willful conduct of appellee. Appellant's intestate, a boy ten years of age, with other boys, was rolling a hoop on the sidewalk in front of a garage in the village of Greenup in Cumberland County, and appellee, while driving his seven-passenger Studebaker touring car on the evening of July 24, 1924, from the street and highway into the garage, struck appellant's intestate with said car causing injuries from which he died. There was an entrance into the garage across the sidewalk on the west side of Kentucky Street. The entrance was near the north side of the garage and automobiles coming into the garage, by means of said entrance, were driven across this sidewalk in front of the garage. About ten feet south of this entrance the garage company had built a large canopy thirty feet north and south out over the sidewalk. Under this canopy eight electric lights were attached. There was a large street light about fifty feet away and a light inside the garage near the entrance. There was a store about twenty-five to thirty feet north of the garage entrance facing Kentucky Street, at which there was a light. The sidewalk immediately in front of the

entrance to the garage was nine feet wide and there was a six foot incline up to said sidewalk from the street, the incline being ten inches higher at the sidewalk than where it joined the west side of Kentucky Street. It was fifteen feet from the start of said incline where is joined the street to the door of the garage. There was a filling station in front of the garage under the canopy.

As the deceased was going north on the sidewalk in front of the garage, rolling his hoop, and as appelant claims, in full view of appellee, appellee drove said touring car up the incline and into said garage, the car striking the deceased and causing the injuries. The declaration consisted of eight counts. The first count charged general negligence; the second, driving at a rate of speed greater than was reasonable and proper, having regard to the traffic, etc; the third, a failure to give a reasonable warning of the approach of said automobile; the fourth, a failure to use every reasonable precaution to avoid injuring the deceased as he was walking along said public highway and to stop said automobile; the fifth negligence failure to provide the said automobile with good and sufficient brakes, and the sixth count charged appellee with negligence failure to give a reasonable warning of his intention to cross the sidewalk and enter the garage with said car. The first six counts of the declaration alleged due care and caution on the part of the deceased and his parents, and the seventh and eighth counts charged a willful and wanton injury. Issue was taken on all counts and the cause submitted to a jury.

The testimony of appellant's witnesses tended to show that appellee's car was traveling at the rate of eight to nine miles per hour as it entered the garage, and appellee's testimony tended to show that the car was traveling at the rate of four to five miles per hour. The testimony of appellant and appellee showed that no sign or warning was given and the horn was not

sounded to indicate that appellee was about to turn or that he was about to cross the sidewalk and enter said garage or by appellee at any time. There was testimony submitted by appellant warranting the submission of the seventh and eighth counts to the jury. There was a verdict and judgment for appellee, and appellant has brought the record to this court by appeal.

Appellant offered no instructions and none were given on behalf of appellant. Appellee submitted and the court gave seventeen instructions for the appellee.

Appellant assigns error upon the giving of the fourth instruction for appellee. This instruction informed the jury that if they found from the evidence that the collision between Lewis Easton and defendant's car was unavoidable or was the result of a mere accident, then their verdict must be for the defendant. The instruction directs a verdict and does not contain all of the facts which will authorize a verdict of not guilty. It does not embody the element that an accident, in order to exclude liability of the defendant, must have been without his fault or negligence. Ill. Iron and Metal Co. v. Webber, 196 Ill. 531; Nelson v. Richardson, 108 Ill. App. 126; Paulson v. McAvoy Brewing Co., 226 Ill. App. 614. It was held in City of Chicago v. Fields, 139 Ill. App. 252:

"But an instruction purporting to state elements which, if proved, will warrant a verdict for a party, and so informing the jury, must be accurate, and if erroneous, cannot be cured by any other instruction. This, for the reason that the jury may have disregarded all other instructions and based their verdict solely on the erroneous instruction. 'If an instruction directs a verdict for either party, or amounts to such direction, in case the jury shall find certain facts, it must, necessarily, contain all the facts which will authorize the verdict directed, *** and the error in such an instruction is not obviated by giving conflicting instructions.'"

We conclude the giving of this instruction was error. It covers not alone an unavoidable accident but disjunctively covers "or was a mere accident."

Appellee introduced in evidence, over the objection of appellant, an ordinance of the village of Greenup providing as follows:

Chapter VI

"Sec. 8. Whoever shall in any public street or highway of said village fly a kite, play ball, roll hoops or pursue any sport, amusement or exercise, or do anything in its nature likely to scare horses, injure, embarrass or annoy passengers of vehicles; or whoever shall ride or propel any velocipede or bicycle upon any sidewalk in said village, or do anything likely to embarrass or annoy any person in the vicinity or passing along a sidewalk or street or interfere with the enjoyment of private property shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one dollar nor more than twenty-five dollars."

Appellant assigns error upon the admission of said ordinance in evidence and the giving of the instruction. Objections were properly made to the introduction of the ordinance and exceptions duly preserved. Appellee contends that inasmuch as the ordinance was properly in evidence the instruction was proper. The question is, whether the ordinance covefs a case of rolling a hoop upon the sidewalk. The ordinance specifically provides that one riding or propelling any velocipede or bicycle upon any sidewalk, or doing anything likely to embarrass or annoy any person in the vicinity or passing along a sidewalk or street or interfering with the enjoyment of private property shall be deemed guilty, etc. That part of the ordinance relating to sidewalks does not mention rolling hoops except in general terms, as doing anything to embarrass or annoy persons upon the sidewalk, of which no offense was shown in this case. The clause referring to rolling hoops is aimed to protect horses and passengers in vehicles and is more aptly to protect persons and

vehicles using the roadway, of which nature no offense was shown to have been committed by the deceased in this case. Strictly speaking, in the opinion of this court, the mere rolling of a hoop upon the sidewalk, under the ordinance in question, was not an offense unless it was further shown that said act was an embarrassment or annoyance to some person under the classifications mentioned in the ordinance. As was said in Crawley v. Jermain, 218 Ill. App. 52:

"Pedestrians have a right of way upon a sidewalk, and one who drives a vehicle over such sidewalk is obligated by law to do so in a careful way so as to avoid injuring pedestrians rightfully using such sidewalk. * * *

"It is idle, in the circumstances of this case, to contend that plaintiff was not in the exercise of due care for her own safety; she had a perfect right to assume that the sidewalk was safe for her to walk upon and that it was as safe for a deaf and near-sighted person as it was for those whose faculties of sight and hearing were normal."

In the opinion of this court it was error to admit the ordinance in evidence and to give the instruction based upon it.

Appellant complains of the giving of the eighth instruction for appellee as follows: "The court instructs the jury that if you find from the evidence in this case that the defendant was exercising due care and caution in the handling of his automobile at the time of the accident complained of in this case and that the deceased, Lewis Easton, suddenly and without warning and under circumstances which were not reasonably to be expected, started to run in front of the defendant at a time when the defendant in the exercise of ordinary care, had not sufficient time to prevent injuring him, then and in that event your verdict should be for the defendant."

This instruction directs a verdict and entirely omits appellee's negligence in not giving any warning of his approach, which was a material issue in the case. The instruction refers solely to the conduct of appellee at the time of the accident, when it is undisputed that he gave no warning of his approach or of his intention to cross the sidewalk. Section 40 of chapter 121 of the Revised Statutes, The Motor Vehicle Act, makes it the duty of the operator of a motor vehicle, upon approaching a person walking upon a public highway, to give reasonable warning of his approach and use every reasonable precaution to avoid injuring such person, and, if necessary, stop his said motor vehicle until he can safely proceed. Under the circumstances, the instruction as given omitted vital issues in this case.

Appellee's tenth instruction informed the jury that it was the duty of the parents (and each of them) of the deceased to exercise the same degree of care concerning the said child as an ordinarily prudent person would exercise under like circumstances, and the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that they were exercising such care over their child at and just before the time of the injury to him, and the jury were instructed, if they found from the evidence that the plaintiff has not so proven, they should find the defendant not guilty. There was a similar instruction as to the care and caution required of the deceased and directing a verdict. These instructions entirely ignored the seventh and eighth counts, charging a willful and wanton injury. Appellant offered no instructions and none were given by the court in appellant's behalf. Appellee contends that the issue of a willful and wanton injury was abandoned by appellant offering no instructions, citing Schenck v. The Chicago Railways Co., 211 Ill. App. 466; but in the case cited plaintiff did offer instructions which omitted the willful and

wanton counts. The rule is, that where an instruction directs a verdict, if certain facts are found to be true, and the instruction is erroneous, it cannot be cured by other instructions in the case, Ill. I. and M. Co. v. Weber, 196 Ill. 531; Osner v. Zadek, 120 Ill. App. 446. Where the instructions given contain errors that could not be cured by others, then it may be proper to reverse on account of erroneous instructions, although all that are given are not in the record. Meyer v. Femmee, 72 Ill. 577; Ill. Cent. Railroad Co. v. Sanders, 58 Ill. App. 122; Loeb et al v. Alexander, 174 Ill. App. 145. The giving of these instructions was error under the issues in this case.

Appellee submitted three separate interrogatories to the jury as follows:

"1. Was Lewis Easton at the time of his injury violating Section Eight, Chapter Six of the Ordinances of the Village of Greenup?

"2. If you answer question No. 1 'Yes' state whether or not his conduct in violating said ordinance was the proximate cause of his injury.

"3. Did the defendant, at the time of the accident which resulted in the death of Lewis Easton, act wantonly, willfully and with a reckless disregard of the rights of the deceased?"

And the jury were instructed that if they returned a verdict for the defendant they need not answer the interrogatories. The jury did not answer the interrogatories, but returned a verdict for the defendant.

The first and second interrogatories, as we have held, were upon immaterial issues and were prejudicial to appellant in this case, and we know of no rule or precedent upon which a jury should be relieved from answering interrogatories, in case they found for one or the other of the parties, in a case of this nature. It

certainly might have had a tendency to make it easy for the jury to find a verdict for the defendant, and while the judgment of the lower court would not be reversed if this were the only error in this case, the practice is not to be commended.

Other errors are pointed out, but it would extend this opinion to too great length to cover them fully, and such as there may be will doubtless be corrected upon another trial. We have been loath to reverse this judgment, because from a reading of the record it is apparent that appellant's counsel, in the lower court, did not furnish the court such assistance as they should in the trial of the case. No instructions were offered by appellant, which was not treating the court fairly, and did not properly present appellant's cause to the court and jury; but in view of the errors pointed out, it is the opinion of this court that the cause should be submitted to another jury. The judgment of the Circuit Court of Cumberland County is reversed and the cause remanded.

Reversed and Remanded.

483a

General No. 7876 APRIL TERM, A.D. 1925 AGENDA No. 42.

Richard Wineinger, as Administrator of the Estate of Eva Catherine Wineinger, Deceased,

Appellee,

v.

Ernest Walz,

Appellant.

Appeal from the Circuit Court of Vermillion County.

Cause 483a returned to court 2-26-26

239 I.A. 683

Shurtleff, J.

This is an action in case brought by the appellee, as administrator of the estate of Eva Wineinger, deceased, against the appellant for causing the death of the deceased, by being struck with an automobile driven by appellant. There was a judgment for three thousand dollars and appellant has appealed.

The case was tried on the second count of the declaration, which pleaded section 40 of "The Motor Vehicle Act" as to the duty of the driver of an automobile on a public highway as follows:

"In approaching a person walking along or upon a public highway the operator of a motor vehicle shall give reasonable warning of his approach, and use every reasonable precaution to avoid injuring such person."

The negligence averred was, that the deceased was walking on and along a public highway in an easterly direction and that the appellant was driving an automobile in the same direction, and approached the deceased, and that the appellant negligently and carelessly failed to give any signal or warning by sounding his horn, or any other reasonable warning of the approach of his automobile, and failed to use every reasonable precaution to avoid injuring the deceased in violation of said statute, and thereby struck the deceased and killed her.

The general issue was filed and the case tried on the issues thus formed.

The accident happened on a public highway in the country a short distance east of the City of Danville. At that place the highway runs in an easterly and westerly direction. The deceased was eight years old, and with her sister Alma, who was ten years old, was attending the public school a short distance east of the place where the accident occurred. The deceased and her sister, before school in the morning, had gone west from the school house to a little store on the north side of the public highway where they had bought a school tablet and some candy suckers, and then left the store and started back east on the public highway to school. It was about half past eight in the morning of October 8, 1924.

At that place the highway consisted of a brick pavement fourteen feet wide, which had been laid down on the ordinary country highway. Therewere no sidewalks along the highway but the pavement was laid a little to the north side of the highway and immediately on the north side of the pavement there was a shoulder or pathway about two or two and one-half feet wide and then a deep ditch, and on the north side of the ditch the highway fence. To the south of the pavement was a cinder space that was covered with cinders from seven to eight feet in width.

There is no dispute at all but that the deceased and her sister were walking east in this public highway from the little store back to the school house, and that the deceased was struck and killed about eighty-five feet east of the store. There is some conflict in the evidence, as is usual in such cases, as to just where the little girls were walking in the highway prior to the accident, but the weight of the evidence shows that the deceased was walking about the center or north of the center of the brick pavement, when she saw an automobile approaching from the east

and stepped off the pavement to the south where she was hit by the appellant.

There is some conflict in the testimony as to just how appellee's intestate crossed to the south side of the pavement, but the preponderance of the testimony is, that she hurried, neither walking or running, but was facing all of the time towards the car coming from the east. The testimony of appellant and appellee was to the effect that appellant's car was about twenty-five feet from appellee's intestate when she was crossing the pavement to the south, and appellee's witness, who was approaching the scene in a Ford truck from the east, about one hundred feet away, testified that appellant's car was traveling about twenty-five miles per hour, while an occupant of appellant's car testified that the car was only going at the rate of five to six miles per hour. It was shown by the testimony that appellant's car plowed tracks in the cinders south of the pavement for a distance of thirty-six feet, apparently by the rear wheels skidding, under the pressure of the brakes, and the car stopped about seven feet after it struck appellee's intestate. It is undisputed that no horn was sounded or warning given by the appellant.

Appellant contends that our courts have never placed a construction upon section 40 of The Motor Vehicles Act, and that in many cases, upon warning given, it would create confusion and tend to greater hazard to pedestrians than if no such warning was given. In this case it is contended that to have sounded the horn appellee's intestate would have thought it was the car to the east sounding the warning to her and hastened her speed over in front of vehicles traveling to the east on the cinder and gravel roadway south of the paved portion of the road. Certainly, appellee's intestate could not have been more injured or confused by the sounding of a horn than in the instant case. She was killed. The

sounding of a horn might not have saved her life. There are cases where persons placed in positions of danger, seeing the car of instrument of danger, the blowing of a whistle or ringing of a bell becomes superfluous and the duty to give warning is negatived. However, that is not this case. The statute is plain and not ambiguous. It means just what it says and says just what it means, and is a highly beneficial Act to protect the old as well as the young, who are equally entitled to use the "King's Highway," the country road, as the automobile driver. The duty on the part of the automobile driver is absolute. The questions of negligence, contributory negligence, or want of due care on the part of pedestrians and proximate cause are all questions of fact to be passed upon by the jury. Appellant contends that although appellee's intestate was a child but eight years of age, appellant owed to her no greater duty of care and precaution than if she had been an adult and the argument is, that the parents of the child, by permitting her to go upon the road with a sister ten years of age, had emancipated her and determined that she was of sufficient age, mentality, understanding and experience to protect herself from the dangers of traffic, and that the parents were guilty of negligence, if anyone, and cannot recover. We cannot subscribe to this doctrine, or hold that, notwithstanding the new methods of travel, children eight and ten years of age may not travel the public highways in going to school, unaccompained by their parents, and be entitled to a greater degree of care and caution from drivers than adults. The paved roads and the Motor Vehicle law have not changed the common law to the advantage of reckless driving.

Appellant assigns error upon the court's refusal to permit appellant to testify in his own behalf, the cause having been brought by an administrator. There was no error in this ruling. Sec. 2, chap. 51, Rev. Stat. Forbes v. Snyder, 94 Ill. 374;

Consolidated Ice Machine Co. v Keifer, 134 id. 481; Albers v. Sessel Exr. 193 id. 153.

It is called to the court's attention that in Van Meter v. Goldforb, 317 Ill. 620, opinion filed June 18, 1925, the court construed exception 3 of section 2 of the Evidence Act, and held in a similar case that when the next of kin, having an interest in the recovery, testified in regard to the "transaction," then the opposite party or party in interest shall also be permitted to testify to the same transaction, and the term "transaction" was construed to mean the accident. This did not render appellant a competent witness generally, but in case any of the next of kin, interested, testified as to the accident or transaction, appellant should have been permitted to testify to the same transaction. Had appellant made an offer of proof which was material in this case, and the court had refused to receive it, such refusal would have been reversible error in this case. But no offer of proof was made and so far as this record is concerned there is nothing to show the court that appellant, if he had testified, would have offered any testimony contradicting appellee's case. Where a witness is competent for some purposes, but not generally, it is not error to sustain an objection to the witness's competency, and unless an offer of proof is made so that the court can pass upon its competency, it is nor error to exclude the witness. (Stewart et al v. Kirk Admr. 69 Ill. 511; Winslow et al v. Newlan et al, 45 id. 150; Ittner Brick Co. v. Ashby, 198 id. 585; Chency v. Colby, 225 id. 401: Casey v. Reedy, Elv. Mfg. Co., 166 Ill. App. 605; Johnson v. Peoria Ry. Co., 179 Ill. App. 303; Whitley v. Wright Carriage Body Co., 186 Ill. App. 300; McMurray v. Peoria Ry. Terminal Co., 208 Ill. App. 488.)

In Winslow et al v. Newlan et al, supra, the court held: "When they proposed to examine him they should have stated what they could prove by him, so that the court could have determined

whether it would have been material to their defense. When a party brings a case to this court, and asks a reversal, it devolves upon him to show that error has been committed, to his injury, by the court, trying the cause. And he does not show such an error by simply showing that he called a witness that the court would not permit him to examine, unless it appears what it was expected the witness would prove."

The record must show that the testimony would have been beneficial to the party offering it. Appellant contends that the rule does not apply to a party to the suit. In this, appellant is mistaken. In Stewart et al v. Kirl, Admr., supra, and in Winslow et al v. Newlan et al, supra, the rejected witness in each case was a party to the suit. The rule announced in Van Meter v. Goldforb, supra, cannot change the conclusion formerly arrived at in this case.

The testimony of the father of appellee's intestate, who is the administrator in this case, was competent, inasmuch as appellant, the adverse party, was not defending in any capacity mentioned in the prohibition of the statute. (Edwards v. Negley, 193 Ill. App. 426.)

Appellant complains that he was not permitted to show by one witness that his car was going slowly or fast, without undertaking to show the particular rate of speed of the car. The rate of speed of appellant's car was not one of the material questions in the case and the ruling was not erroneous in this case. (Casey v. Chicago City Ry. Co., 191 Ill. App. 474; Chicago City Ry. Co. v. Wall, 93 Ill. App. 416.)

Appellant assigns error that the court refused to permit him on cross examination of appellee's witness Hacker to inquire in reference to making a test a few hours after the accident by making tracks into the cinders with his light Ford chassis. In this there was no error.

It was not proper cross examination and the car Hacker used was entirely different from the large Special Six Studebaker sedan driven by appellant.

Appellant assigns error upon the giving of instructions. It is objected that instructions one, two and three ignore all defenses made, mentioning contributory negligence on the part of appellee's intestate and assumed risk. We have examined the case of Streeter v. Western Scraper Co., 254 Ill. 255, cited by appellant as authority for the doctrine that assumed risk applies to appellee's intestate in attempting to cross the highway, but we are not at all persuaded that the doctrine has anything to do with this case. It is comprehended in the doctrine of contributory negligence. Instructions one and two are mere statements of the statute and as to the burden of proof, and instruction number three fully covers the due care and caution of appellee's intestate and her parents. It is further objected that the third instruction attempted to blend separate and distinct propositions of law, citing C. B. and Q. R. R. Co. v. Johnson, 103 Ill. 512. The rule criticising instructions is, where an instruction attempts to connect discordant propositions and attempts to blend separate and distinct legal propositions in the same sentence or paragraph. None of the instructions given are subject to this criticism. The fourth, fifth and sixth instructions are not subject to the criticisms made against them. Under the sixth instruction, appellee is not limited to the child's earnings until it becomes eighteen years of age, in case it had lived. (Lichenstein v. Fleesh Furniture Co., 272 Ill. 198), and appellee's seventh instruction has been approved in Rantman v. Chicago Traction Co., 156 Ill. App. 460. We have examined the instructions offered by appellant and modified by the court and find no error. Appellant's offered instruction number twelve, refused, was fully covered by other instructions given.

Counsel for appellant seriously criticise the argument of counsel for appellee in this case before the jury in the court below, and we have examined into that assignment of error fully. Appellee's intestate was spoken of as a "baby" and a "child" and counsel stated: "when this child that would be here today with her father and mother if this man had just used half care as required by the laws of Illinois," and appellant's automobile was described as an "engine of death" and as "coming down upon this child". The foregoing are as strong statements as can be found in the address to the jury to which appellant makes criticism. There are some statements criticised that are beyond the line of conservative argument and indicate the heat of a contested trial, and slightly blend oratorical enthusiasm with the sympathies of the case, but there was no statement made, as we read the record, intending to inflame the jury or arouse their prejudices against the appellant, and there is nothing in this assignment of error in this case that we consider of sufficient importance to reverse the judgment. The objection to counsel, before the jury in the court below, briefly discussing the change in the times and the age of fifty cent dollars, we do not deem reversible error. There are very respectable authorities holding that it is a proper subject for the jury and court to take into consideration. (8 R.C.L. 679; Canfield v. Chicago Ry. Co., 142 Ia. 659 (121 N. W. 186); Johnson v. St. Paul City Ry. Co. 36 L. R. A. 589; Dale v. New Orleans R. Co., 19 L.R.A.,(N. S.) 823; Rogers v. Alein Lumber Co. 39 L. R. A. (N.S.) 205:)

It is objected that the judgment is excessive. An examination of the various cases passed upon in the Supreme Court and the various appellate courts, and the amounts of the verdicts and judgments that have been permitted to stand in similar cases, refutes

this objection. The record in this case is free from any reversible error and the issue on the facts is not so close and conflicting, as appears from a reading of the entire testimony, that it would warrant a reversal, even though slight errors intervened.

The judgment of the Circuit Court of Vermillion County is affirmed.

Rehearing denied Dec 16 1925

Gen. No.7885 April Term, A. D. 1925 Agenda No. 54

239 I.A. 683

Chambersburg State Bank, a Corporation,
Appellee
v.
Edmund B.Tolbert,
Appellant,

Appeal from the
Pike County
Circuit Court.

Certiorari denied

Shurtleff,J.

Appellee filed a bill in partition against appellant to divide and partition thirty-two head of fat cattle and forty hogs. Appellee claims to have derived title to an undivided one-half interest in said property by virtue of a judgment, execution and sheriff's sale upon said judgment, held February 16, 1924, against the property of Carl Tolbert and Grace Tolbert, his wife, and if the judgment debtors or either of them were the owners of the property at the time the execution was issued, appellee, the purchaser of the property at the sale, apparently acquired good title to an undivided half. Appellant denied the title of the judgment debtors or either of them to any interest in said cattle and hogs, and claim he was the sole owner of the property. The sheriff levied upon said property on the 22nd day of January, 1924, while appellant was loading the cattle and hogs into cars at Perry Springs station in Brown County, to ship to Chicago. The expense of care and feeding the stock from the date of levy to the date of sale amounted to $399.07, and appellee, after purchasing the one-half of the stock, incurred an expense of $1671.54 for the care and feeding of the animals until the appointment of a receiver upon the 29th day of May, 1923. The receiver incurred an expense of thirty-one dollars and sold said stock upon the Chicago market June 4, 1923, the cattle bringing $4737.86 and the hogs $1147.68 net, after the deduction of shipping charges. The appellant

answered the bill, denying that the judgment debtors ever had any interest in said property or that appellee acquired any title by said sale. Appellant, claiming to be the sole owner of said property, filed a cross bill averring title and that he had purchased said cattle with his own moneys and bred and raised the hogs on his farm and had fattened them and prepared the same for market on the 22nd day of January, 1924, and when about to market said stock, the appellee bank, by its agents and the officers, under said pretended execution, had taken the said property out of his hands and excluded appellant from its possession, and claims damages in the sum of eighty-five hundred dollars, the value of said property at the time it was taken, and five hundred dollars for the trouble and expense occasioned appellant by the wrongful taking. There were answers to the bill and cross bill and replications filed. The cause was referred to the master to take and report the evidence to the court and such evidence and testimony was reported to the court without findings or recommendations.

The court by its decree found that the appellee, by purchase at the execution sale, became vested with good title to the undivided one-half of the thirty-two head of cattle, but that the execution debtors had not title or interest in the hogs and that appellee took no title by the purchase. The court further found that the total expense for care of said cattle and hogs was $2101.61; that of this amount $1838.43 accrued on account of the care of the cattle and was chargeable against said cattle; that the interest of appellant in the cattle and hogs, after the expenses of caring for and feeding them are deducted, amounted to the sum of $2890.45, the court arriving at this amount upon the proofs as follows:

1.	First cost of the cattle	$1550.00
2.	Value of hogs on Jan. 22,1924,.....	627.66
3.	Interest on last item from Jan. 22,1924, to date of decree	38.07
4.	Appellant's share of the net value of said cattle over and above the expenses chargeable against the same and first cost	674.72
	Total	$2890.45

the hogs were bred and raised upon the farm. The same principle should apply to both cattle and hogs.

The question of ownership in this case must be settled largely upon the testimony of appellant and his two sons, and the statements made by appellant to others, together with the circumstances under which appellant's farm was operated. Appellant owned a farm of one hundred sixty acres about one mile east of Chambersburg in Pike County, upon which he resided with his family until about the year 1915. He owned another farm across the road upon which his son Chauncey later lived, not important to the issues in this case. In about 1915 appellant moved to the village of Chambersburg, leaving his sons, who had both married, Carl Tolbert upon the one hundred sixty acres north of the road and Chauncey Tolbert upon the farm south of the road. Appellant testifies: "I didn't have any written contract with Carl; as near as I can remember our arrangement was share and share alike; I owned horses, implements and the farm, Carl and the other boy, Chauncey, were to do the work; whenever Carl wanted money I gave it to him; I never kept track of how much Carl got out of the farm. I don't think there was any division of the crops between myself and the boys. When the crops were sold they received a portion of the profits and of the profits of the stock raised; that arrangement was for the first year. After the beginning of the second year I don't remember what arrangements were made. The first year the boys made no money. They received a part of the crops and a portion of the sale of stock." Carl Tolbert says that the first year he was to receive only one-third of the profits and that he lost five hundred dollars that year and after that he was to receive more. As the years went on Carl Tolbert worked other lands in the neighborhood, bought and sold stock and engaged in other business than farming, carried a bank account with Appellee Bank in which

he made deposits of considerable amounts and upon which he drew checks. This continued until in December, 1921, or January, 1922, Carl Tolbert became considerably involved in debt. Carl Tolbert became indebted to the witness Berger for a considerable amount, and gave him a chattel mortgage upon a tractor, cultivator, disc and eight head of horses upon the farm and also some wheat. Carl Tolbert also became indebted to Appellee Bank in about the sum of twenty-nine hundred dollars for borrowed money and upon the 15th day of September, 1921, Carl executed and delivered to Appellee Bank a note for the sum of twenty-nine hundred dollars and a chattel mortgage upon Carl's undivided one-half of 215 acres of corn and some cows, hay and hogs upon the farm claimed to be owned by appellant. This indebtedness ran until the month of October,1923. Carl Tolbert made financial statements in writing to Appellee Bank after the indebtedness was incurred, listing the one-half of the hay, grain and live stock upon the farm as his property. This matter of Carl's indebtedness came to the knowledge of appellant in the month of December, 1921, or the month of January, 1922, and it is claimed by appellant and Carl that they had a new deal about the operation of the farm. Appellant further testified as to the period of 1915 to 1921; "Had Carl raised more stuff he would have received more." The father learned of the indebtedness and of appellee's mortgage about January 1, 1922, and he says he and Carl made a new arrangement. The father says: "He (Carl) said, 'I want you to go on my note at the bank.' He said he owed them $2700. I told him I would not. I said, 'if you cannot do better than that, you can stay and take what I am a mind to give you or pack your clothes and go.' That is what I call a new contract. I was willing to do almost anything to keep Carl on the farm; I told him he could stay on the farm and take what I would give him. Since that time I have not kept an account of what I gave him; he has a wife and a

boy. I paid all of the hired help he has had since I told him his time was out, for work done on my farm; at the present time Carl does not own any horses on the place nor mules, nor has he had any interest in the last three years in the proceeds of the farm." Appellant says that Carl remained on the farm using the same tools and machinery, but appellant does not know how much he has paid him during the last three years. Carl testifies that he proceeded on the farm the same as he did before but he testifies to the same talk with his father that appellant relates. However, the witness Dennis, cashier of appellee bank, testifies that after this new arrangement was made appellant was shipping the stock and depositing the money in his own name and giving him (Carl) some. Carl said he thought it was a pretty good arrangement, because he had paid $2,000 indebtedness since they started the change.

Appellant objected strenuously at the hearing to all statements of the son Carl offered in evidence not made in the presence of appellant. Quite likely there is some testimony in the record to which objections should have been sustained and which was not considered by the court below and will not be considered by this court. In this connection it is sufficient to say that the two sons of appellant offered by appellant as witnesses, were sufficiently impeached so that little consideration should be given to their testimony in any event. Appellant has failed to account in any manner as to his dealing with Carl Tolbert since December, 1921. Appellant did pay the Berger chattel mortgage for over thirteen hundred dollars, which to that amount corroborates Carl's statement. To come to the property in question; the hogs were bred and raised on the farm by Carl Tolbert under some kind of an

arrangement. The father testifies that his son was working for whatever the father saw fit to pay him--anything or nothing. Carl testifies that he raised them under the same arrangement that he had prior to 1921. While we do not think the highest credibility should be imputed to some of these witnesses, those presented by the same side should be competent to impeach each other. Appellant or appellant and his son Carl were cattle feeders and hog raisers. Appellant testifies that he purchased the thirty-two feeding cattle at the yards in East St.Louis in February, 192[illegible]; that he arranged with the Versailles State Bank to cash his check for the cattle and produced the check. He says no one contributed any portion of the purchase price represented by the check; that he gave his note to the Bank to cover the check after he returned home. Asked particularly on cross examination, appellant testified: I gave a note to the Versailles Bank for the cattle; me and Carl never had no note; the first note was paid with a new note. I received the old note. I suppose I destroyed it." Appellant further testified that he didn't know whether a note for $261.84 included interest on the note for $1505.45 and he didn't know whether Carl's name was on the note with his name. The Bank records of the Versailles Bank were produced and it was shown that the check for the cattle was given by appellant for $1455.45 on February 16, 1923, and that the amount of the check was covered by the note of appellant and Carl Tolbert for the same amount on February 19, 1923. This note was renewed by a note for $1540.45 given by Carl Tolbert and appellant on September 10,1923, and Carl Tolbert and appellant gave the Bank another note for $1350.00 to renew an old indebtedness and in addition the same day appellant and his son Carl gave the Bank a note for $261.84 to cover various items of interest on different notes, part of which was on the cattle note.

The record teems with contradictions, inconsistent statements and absurd pretensions. The statements of appellant that his new

arrangement with his son Carl was that the son was to stay and work the farm and take in pay whatever the father wished to give him, can only be construed that the father was to take charge of the business management, collect all the moneys and pay the help for the son's benefit, as well as his own protection, and it was so construed by the son and at once the indebtedness of the son was in the course of being extinguished. No one would credit the statement that the son was to continue the work on the farm with no interest in its proceeds and no promise of a wage of any kind. If appellant had had any suspicion that he was so understood or that that was the situation, he would not have permitted his son Carl to sign notes for cattle or any other purpose with him at the bank. The very fact that Carl Tolbert and appellant gave their joint notes at the bank for the cattle in question, together with the other evidence and circumstances in the case, makes the proof clear and convincing that the purchase of the cattle was a joint venture of the father and son in the business in which they were then engaged.

There are other circumstances and proofs in the record that make it apparent that the father and son were engaged in a joint venture and that each had an interest in the property in January, 1924. On the 26th day of November, 1923, Carl Tolbert gave a chattel mortgage to appellee, conveying his undivided one-half interest in all the cattle, hogs and grain upon said farm, including the thirty-two feeding cattle and hogs in question, to secure the payment of a note for $3120.49 due in one year, and it appears that this mortgage was given as collateral security for the former indebtedness, the note for which had been entered in judgment by Appellee Bank on the 6th day of June, 1923, upon which said execution was issued. Reading the whole record, it is the opinion of this court that there was no error in finding that appellee was the owner of one-half of the cattle. The proof

showed that in fattening cattle as many as forty-two hogs will thrive and fatten running behind and picking up the droppings from thirty-two fattening cattle, and that to fatten the hogs very little corn or grain need be fed them, and that just before the hogs are ready for the market. In this case the hogs followed the cattle and were fattened in this manner. It would be strange indeed if appellant and his son Carl owned the cattle in common and there was a different ownership in the hogs. The son, Carl, raised the hogs and they were a part of the produce and profits of the farm. In the opinion of this court appellant and his son, Carl, never changed the contract and arrangement entered into between them in 1915 or 1916 as to the running and division of profits on the farm, but it does appear that after December, 1921, the father, appellant, did the buying and selling and handled all the funds for the benefit of the partnership. It is the opinion of this court that appellee was invested with good title to the half of both cattle and hogs by purchase at execution sale.

Appellee has also assigned error in that the decree of the lower court deducts from the sale price the original cost of the cattle $1550 for the benefit of appellant. This was error. Appellant and his son, Carl, gave their note to the Versailles State Bank in February, 1923, for the purchase price of these cattle. This note indebtedness was renewed upon September 10, 1923, by a note signed by Carl Tolbert, E. B. Tolbert (appellant) and Orpha Tolbert, in the order named, for the sum of fifteen hundred dollars. The Versailles State Bank is not a party to this suit and nothing is shown in the testimony that either of the makers has paid the note or that either party to this suit is entitled to contribution by reason of any such payment. Otherwise, appellee is not called upon to pay any other creditor of appellant or Carl Tolbert who did not have a lien upon said stock at the time of the execution sale.

Appellant assigns error upon the court's decree charging appellant one-half of the charges and expenses of feeding and caring for said cattle and hogs after January 22, 1924. The proofs, which are uncontradicted, show that it was not good husbandry to continue to feed said cattle after they were properly prepared for market, and that they were in such condition on January 22, 1924. The continuous feeding of said stock after January 22, 1924, while in the possession or under the control of appellee, was shown to have been carried out at a great loss. This loss is not properly chargeable to appellant, who had no control over the property during this time. Heope v. Szczepanski, 209 Ill. 107; Bartholomew v. Bartholomew, 203 Ill. App. 512. In Heope v. Szczepanski, supra, it is held:

"The cotenant, against whom such improvements are charged, will be charged, not with the price of the improvements, but only with his proportion of the amount which at the time of the partition they add to the value of the premises (Cooter v. Dearborn, 115 Ill. 509; Rowan v. Reed, 19 id. 21)."

In Bartholomew v. Bartholomew, supra, the court held: "From Louvalle v. Menard, 6 Ill. (Gilm.) 39 to Bayley v. Nichols, 263 Ill. 116, the rule prevailing in this State has been that in partition, where a sale is had, those who have lawfully made improvements upon the premises are allowed by way of compensation the actual increase of the price received at the sale in consequence of the improvement. It is also clear that a tenant in common in possession may make proper improvements without the consent of his co-tenant."

In Chambers et al v. Jones, 72 Ill. 281, it is held that if a tenant in common makes improvements on the common estate he does so at his peril. Appellee urges that a tenant in common is entitled to contribution for expenses absolutely necessary for the benefit and preservation of the common property, citing cases, and

and charges of appellant, and that appellant is entitled to the one-half of the value of said stock as of the 22nd day of January, 1923, amounting to the sum of $2025.73, of which the sum of fifteen hundred dollars has been paid, and there should be paid to appellant the balance, amounting to $525.73, in full of appellant's interest in said stock; that the appellee should be chargeable with the costs and expenses of feeding and caring for said stock from the 22nd day of January, 1924, until the sale of said stock, and the balance of said moneys should be paid to appellee. Each of the parties to this suit should pay one-half of the court costs in the lower court, the same to include the allowance to the receiver, but not to include the sheriff's or receiver's charges and expenses for feeding or caring for stock or the feed for the same. Each party should pay one-half of the costs in this court.

Reversed and Remanded with Directions.

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